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No. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In re: **ISABEL ANDRADE, *et al.***

Petitioners

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT PETITION FOR WRIT OF CERTIORARI

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113 pp

QUESTIONS PRESENTED

1. Whether a trial judge must be recused under 28 U.S.C. §§ 144 or 455 or the Due Process Clause, or in the exercise of the supervisory powers of higher federal courts, when that judge will act as the *trier of fact* on disputed issues in a civil action against the United States under the Federal Tort Claims Act and

(a) he has already decided those issues against the plaintiffs in a prior case to which the plaintiffs were not parties;

(b) he explicitly based some of his prior conclusions on extrajudicial, inadmissible hearsay newspaper articles;

(c) he had private, extrajudicial consultations with United States' agents about some of the most critical underlying events in the Plaintiffs' FTCA case;

(d) he then extrajudicially discussed those consultations and his knowledge of the underlying events with his brother, told his brother whom he would blame (not the United States) if these events led to any injuries, and implicitly exonerated the United States and blamed members of the Plaintiffs' group for any injuries;

(e) he has demonstrated a class bias against the Plaintiffs by concluding that all members of the subject religious group and their supporters are vehemently antigovernment and insincere in their practice of a false religion; and

(f) in the same case where he will be trier of fact, he will also preside over a related jury trial of defendants who include his former Chief Judge and the local Assistant U.S. Attorney who practices before him and who extrajudicially briefed and influenced him on important aspects of the case?

2. Whether, as an alternative to recusal, this Court or the Court of Appeals, in the exercise of its supervisory powers, should remand a case for reassignment to a different trial judge when the fairness and impartiality of the presiding trial judge is called into question by the many negative circumstances set forth in Issue 1.

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IN THE
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In re: ISABEL ANDRADE, *et al.*
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Joint Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

Isabel Andrade, *et al.* (collectively Petitioners) respectfully petition for a writ of certiorari to review the Fifth Circuit Court of Appeals' denial of the Petitioners' Petition for Mandamus which sought the recusal of Judge Walter S. Smith, Jr., of the Western District of Texas, Waco Division, in this case. The mandamus petition was filed before Judge Smith decided the Defendants' motions to dismiss and for summary judgment and those motions remain subjudice.

CITATIONS TO OPINIONS AND ORDERS ENTERED IN CASE

The Fifth Circuit Court of Appeals' June 9, 1997 Order denying Petitioners' Petition for Mandamus is not reported but is reproduced at

Appendix B, p. 10a. Petitioners have filed a Suggestion for Rehearing *En Banc* but the Fifth Circuit has not yet ruled. The February 18, 1997 Order and opinion of District Judge Walter S. Smith, Jr. denying Petitioners' motion for his recusal is not published but is reproduced at Appendix C, pp. 11a - 22a.

BASIS FOR JURISDICTION

The Fifth Circuit Court of Appeals' decision, which is the subject of this Petition, was entered on June 9, 1997. This Petition was mailed, via the United States Post Office, express mail, before the 90-day deadline expired.

The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

UNITED STATES CONSTITUTION PROVISIONS AND UNITED STATES STATUTES INVOLVED IN THIS CASE

28 U.S.C. § 455(a) states:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455 (b)(1) states:

> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

28 U.S.C. § 144 states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The Fifth Amendment to the United States Constitution, Due Process Clause, states:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This Petition arises out of Federal District Court Judge Walter S. Smith, Jr.'s refusal to recuse himself in this case and the Fifth Circuit Court of Appeals' denial of a Petition for Mandamus seeking his recusal. The Petitioners are the estates of deceased Branch Davidians, the surviving Branch Davidians, and close relatives of Branch Davidians. The Branch Davidians were a religious group who lived in their own community, Mt. Carmel, near Waco, Texas.

On February 28, 1993, the Federal Bureau of Alcohol, Tobacco and Firearms (ATF) attempted to execute a search warrant for Mt. Carmel and an arrest warrant for David Koresh, the Branch Davidians' spiritual leader. The warrants were based on allegations of federal law weapons violations. In the attempted search and arrest, a gun battle erupted where 6 Branch Davidians were killed and 4 were wounded and 4 ATF agents were killed and 16 were wounded.

The ATF then withdrew and federal agents, under the direction of the Federal Bureau of Investigation (FBI), maintained a siege of Mt. Carmel, which included surrounding Mt. Carmel with military tanks and armored

personnel carriers, throwing light and sound grenades (called flashbangs) at any Branch Davidian who attempted to leave Mt. Carmel without FBI permission, crushing the Davidians' automobiles and bicycles, and loudly playing sounds such as the cries of animals being slaughtered. The FBI also discussed with the Branch Davidians - primarily David Koresh and Steven Schneider - their surrender. Many Davidians did surrender.

The Petitioners contend that, in April 1993, the remaining Davidians agreed to surrender, and would have surrendered, upon David Koresh's completing his interpretation of a Bible section and that Koresh was making rapid progress towards that end. Respondents contend that the Davidians' promise was not genuine.

Despite the promise of surrender, the FBI launched an April 19, 1993 assault against the Branch Davidians. During this assault, army tanks crushed portions of Mt. Carmel and the tanks and armored personnel carriers inserted CS gas into it. Petitioners contend that this gas, along with chemicals mixed with it, were highly flammable and very toxic. Petitioners contend that the gas, because of its toxicity, killed or incapacitated the Davidians. Petitioners also contend that United States' agents inserted pyrotechnic and explosive devices into Mt. Carmel. Petitioners contend that the gas and the pyrotechnic and explosive devices caused a fire that consumed Mt. Carmel and led to the deaths of dozens of Davidians. Respondents contend that the gas was not deadly and the Davidians started the fire. Some Davidians also died of gunshot wounds on April 19, 1993. Petitioners contend that, during the April 19 assault, U.S. agents shot at and killed some Davidians and that some other Davidians may have shot themselves or each other in an attempt to spare themselves or each other from an agonizing death by fire.[1]

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[1] The *Brown* Petitioners do not allege that the Branch Davidians shot themselves. The *Andrade* Petitioners agree that the United States was shooting at, and killed some, Branch Davidians on April 19, 1993, and they have sought leave to add this to their consolidated complaint. The *Sylvia* Petitioners, who are part of the *Andrade* group, filed a separate complaint, already alleging this.

Petitioners have sued the U.S. under the Federal Tort Claims Act (FTCA) and sued U.S. and Texas officials under the U.S. Constitution and federal statutes.[2] Petitioners do not have a right to jury trial on their FTCA claims and, thus, the federal judge in their case will be the sole trier of fact for those claims. Petitioners filed these cases in the Southern District of Texas.[3] The district court transferred them, over Petitioners' opposition, to the Western District, Waco Division, before Judge Walter S. Smith, Jr.

Prior to Petitioners' cases being transferred to Judge Smith, he had presided over and made factual determinations in *United States v. Branch*,[4] the criminal prosecution of 11 Branch Davidians for allegedly murdering and conspiring to murder federal agents between February 28 and April 19, 1993, and for alleged weapons violations. The jury fully acquitted three of the defendants and acquitted all defendants of the murder charges but found some defendants guilty of weapons violations, manslaughter and using weapons in a conspiracy to commit murder.

In sentencing the convicted defendants, Judge Smith announced *his own* factual determinations that the Branch Davidians ambushed and murdered ATF agents on February 28, started the April 19 fire, murdered each other, and were, among other disreputable things, an "army" seeking

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[2] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); 42 U.S.C. §§ 1983 and 1985(3); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq.

[3] The Petitioners in the *Gyarfas* case had originally filed suit, in 1993, in the Waco Division. At that time, they were not represented, as now, by Caddell & Chapman; the response to the defendants' motion to dismiss was poorly briefed and the attorneys representing them had almost no financial resources. After Judge Smith's bias became apparent from his decisions in the *Branch* trial and sentencing in early to middle 1994, and Caddell & Chapman became more involved, the *Gyarfas* plaintiffs voluntarily dismissed their *Bivens* case with prejudice. They then filed suit in the Southern District of Texas only against the United States asserting FTCA claims.

[4] *United States of America v. Branch*, No. W-93-CR-046, in the United States District Court for the Western District of Texas, Waco Division.

to "bring about a violent conflict with federal agents."[5] These decisions were Judge Smith's and were not in, or necessary to, the jury's verdict.[6]

Subsequently, on April 2, 1996, Judge Smith issued a summary judgment ruling in *Risenhoover v. Cox,*[7] a case brought by ATF agents and their families against various media defendants and an ambulance company, alleging that they had alerted the Branch Davidians to the impending ATF's February 28 assault and this alert allowed the Davidians to ambush the ATF. In his summary judgment ruling, Judge Smith held that the Branch Davidians (a) started the April 19 fire; (b) lived in a "fortress;" (c) accumulated an "unbelievable" quantity of ammunition; (d) were David Koresh's "army," (e) were paramilitarists; and (f) were led by a "false prophet."[8] Judge Smith has admitted that he relied on local newspaper articles, attached to a *Risenhoover* pleading, to support these negative conclusions about the Davidians' lifestyle and religion.[9]

In these *Branch* and *Risenhoover* opinions, Judge Smith did not distinguish among the Branch Davidians, including the children. Only four of the hundreds of Petitioners were parties to the *Branch* case and none were parties to the *Risenhoover* case.

Before the *Branch* and *Risenhoover* cases, in fact two days before the February 28, 1993 attempt by the ATF to execute the warrants, Judge Smith extrajudicially conferred with two Waco Assistant U.S. Attorneys (AUSAs) — William Johnston (a Defendant in these cases) and John Phinizy. They discussed the ATF's planning for the assault, particularly

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[5] Appendix D, pp. 25a - 27a, and Appendix E, pp. 28a - 29a.

[6] Appendix F, pp. 30a - 49a, and Appendix G, pp. 50a - 55a.

[7] *Risenhoover v. Cox*, Civil Action No. W-93-CA-138, In the United States District Court for the Western District of Texas, Waco Division.

[8] Appendix H, pp. 56a - 59a.

[9] Appendix C, at p. 17a.

problems they were having with the local newspaper running a story which the AUSAs thought would alert the Davidians to the impending raid. The next day — the day of the February 28, 1993 raid — Judge Smith told his brother that, if anyone was hurt in that assault, "he would lay responsibility at the door of the newspaper."[10] That is, he would not lay responsibility at the door of the ATF agents, other government officials, or the United States. That is, he would not blame the Defendants whom Plaintiffs are suing in these cases.

Petitioners do get a jury trial on their non-FTCA claims against the current and former federal and state officials. However, those claims will be tried with the FTCA claims where Judge Smith is the sole trier of fact and those claims include the high profile civil prosecution of former FBI Director William Sessions, who is also Judge Smith's former colleague and Chief Judge of the Western District of Texas, and AUSA William Johnston, who regularly appears before Judge Smith and who, as previously described, extrajudicially briefed him about the ATF's impending February 28 assault and conveyed to Judge Smith his belief that, if alerted, the Davidians would attack the ATF — a belief Judge Smith adopted and conveyed to his brother.

Because of Judge Smith's predeterminations and biases, Plaintiffs promptly moved for his recusal, which he denied in a February 18, 1997 Order.[11]

On April 11, 1997, Petitioners filed a Joint Petition for Writ of Mandamus with the Fifth Circuit Court of Appeals to compel Judge Smith's recusal. A Fifth Circuit panel denied the petition without opinion

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[10] Appendix C, Exhibit 1, pp. 23a - 24a. There is no apparent legal reason for Judge Smith's communications with the AUSAs. Magistrate Dennis Green of the Waco Division, not Judge Smith, signed the warrants for the February 28 assault. *See* Excerpts from the Report of the Department of the Treasury on the Investigation of Vernon Wayne Howell, Appendix I, p. 60a.

[11] Appendix C, pp. 11a - 22a.

on June 9, 1997. Petitioners filed a Suggestion for Rehearing *En Banc* on July 24, 1997, but the Fifth Circuit has not yet ruled on it.[12]

Based on the Defendants' opposition filed in the Fifth Circuit to the Joint Petition for Writ of Mandamus, the following facts appear to be undisputed: (1) Judge Smith has decided, *inter alia*, that Branch Davidians ambushed the ATF on February 28, 1993, conspired to kill federal agents, and intentionally started the fire and murdered each other on April 19, 1993, and (2) Judge Smith has strong, negative views about the Branch Davidians' beliefs, lifestyle, and their attitude towards law enforcement. The Defendants also did not dispute that Judge Smith's role as the sole trier of fact in their FTCA lawsuits is, at least, a relevant consideration in determining his recusal and that Petitioners would not have an adequate appellate remedy to the Judge Smith's bias and appearance of bias.

Accordingly, unless this Petition for Certiorari is granted, Judge Smith will preside as the sole trier of fact in Petitioners' claims against the U.S. even though (a) he has predetermined the key, disputed fact issues against Petitioners; (b) he has strong negative views against the Petitioners; (c) he was extrajudicially briefed by one of the Defendants about one of the key events — the February 28 assault — in a way that criticized the Davidians; (d) he then extrajudicially stated his own opinion that someone other than the Defendants would be at fault if the February 28 assault caused injuries; (e) he relied on hearsay in reaching his prior opinions about the Davidians; and (f) one of the Defendants in the non-FTCA portion of the case is his former colleague and Chief Judge on the federal bench and another Defendant is the local AUSA who appears regularly in his Court and extrajudicially consulted with him about the ATF's February 28 assault.

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[12] When the mandamus petition was filed, Defendants' motions to dismiss and for summary judgment and Plaintiffs' motion to amend their complaint were *sub judice*. They remain so. At Petitioners' request, the Fifth Circuit stayed the trial court proceedings, after Judge Smith twice refused to do so. However, the stay will end if the suggestion for rehearing *en banc* is denied. At that point, or perhaps before, Petitioners will ask this Court for a stay pending its decision on the certiorari Petition.

The Fifth Circuit had jurisdiction in this case under 28 U.S.C. §§ 1331, 1346 and 1651. The District Court had jurisdiction in this case under 28 U.S.C. §§ 1331 and 1346.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Of Federal Law That Have Not Been, But Should Be, Decided By This Court.

A. Where a Trial Judge, During a Prior Case, Has Decided The Key Fact Issues in a Case And Expressed Strong Negative Views About a Class of People, He Is Disqualified From Acting as Trier of Fact in a Subsequent Case Involving Different Parties Who Present the Same Issues And Are Members of The Same Class.

1. *United States v. Liteky* did not address the recusal standard when the trial judge is a trier of fact.

In no case, including *United States v. Liteky*,[13] has this Court addressed the recusal standard when a trial judge acts as the trier of fact. Federal courts have no guidance as to how to apply 28 U.S.C. §§ 144 and 455(a) and (b)(1), the Due Process Clause[14] and *Liteky* when the judge is not merely presiding over a case but is also the juror.

In *Liteky*, the defendant complained that the trial judge should be recused from *presiding* over a *jury trial* because of statements and rulings he made in a prior *unrelated* case, involving the *same* defendant. The *Liteky* judge was not the trier of fact, as Judge Smith is, and the buffer of a jury protected Liteky from the judge's predispositions. There was no claim that the *Liteky* judge had predecided the issues in *Liteky*, nor could

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[13] *United States v. Liteky*, 349 U.S. 540, 114 S. Ct. 1147 (1993).

[14] *In the Matter of Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955).

there have been because the facts of the *Liteky* case had not yet occurred at the time of the prior case.[15]

Though the *Liteky* majority held that

> ...opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible[16]

and it noted that

> [i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant . . . [17]

those statements do not cover a situation where a judge has decided fact issues in a prior case and then becomes the trier of fact in a subsequent case involving different parties. Those different parties have not had an opportunity to meet their accusers' claims and to sway the judge before he makes up his mind and reaches his conclusions. Similarly, *Liteky*'s holdings that a judge's recusal is not warranted when a party merely complains that the trial judge has predetermined the law or legal policy, does explain the recusal standard when the trial judge has predetermined the facts and will then be the trier of fact in the party's case.

Moreover, Judge Smith's predeterminations that the Branch Davidians ambushed the ATF, conspired to murder federal agents, murdered each other, insincerely practiced a false religion, etc., also

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[15] *Liteky*, 510 U.S. at 542-43, 114 S. Ct. at 1150-51. The prior case arose out of events before 1983 and the then current case out of events in 1990. *U.S. v. Liteky*, 973 F.2d 910 (11th Cir. 1992), *aff'd*, 510 U.S. 540 (1993).

[16] *Liteky*, 510 U.S. at 551, 114 S. Ct. at 1155.

[17] *Liteky*, 510 U.S. at 555, 114 S. Ct. at 1157.

predetermine the veracity of the Branch Davidian survivors who will testify on Petitioners' behalf — Judge Smith will not believe them — and the veracity of the federal agents who will testify for the United States' case — he will believe them. Further, Judge Smith will view all of Petitioners' new evidence through his predeterminations. Thus, even with Petitioners' substantial new evidence, they will not get a fair trial before Judge Smith because he will not view their evidence impartially.[18]

Remarkably, Judge Smith's February 18, 1997 Order denying Petitioners' motion for recusal and the Fifth Circuit's June 9, 1997 Order denying the mandamus petition do not even address his role as trier of fact. None of the cases cited by Judge Smith in his Order apply the recusal standards to a judge who, in a prior case, decided the critical issues and then acted as the trier of fact on those same issues in a subsequent, related case. Judge Smith does cite *Liljeberg v. Health Serv. Acquisitions Corp.*, where this Court ordered a judge's recusal, and, notably, the judge was the trier of fact in that case.[19] This failure of analysis shows that federal courts do not understand, are ignoring, or are too deeply discounting the relevance of intrajudicial rulings in determining a judge's recusal when he is also the trier of fact.[20]

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[18] *See Liteky*, 510 U.S. at 563-65, 114 S. Ct. at 1161-62 (Kennedy, J., concurring).

[19] *Liljeberg*, 486 U.S. 847, 867-68, 108 S. Ct. 2194, 2205-07 (1988).

[20] Another case which indicates how much the circuit courts need additional guidance from this Court on recusal is the very recent Fifth Circuit ruling in *In re Chevron U.S.A., Inc., et al.*, No. 97-20612 (5th Cir. Aug. 19, 1997). The Fifth Circuit held that a reasonable perception of bias or prejudice by the judge existed because of his racially insensitive statements during court proceedings. However, the Fifth Circuit refused to grant a petition for mandamus seeking his recusal. Notably, Congress is considering broadening judicial recusal to allow federal litigants one reassignment to different judge, as a matter of right. Amendment in the Nature of a Substitute to H.R. 1252, as adopted by the Subcommittee on Courts and Intellectual Property (Judicial Reform Act of 1997) § 464.

2. Several federal circuit and district courts have held that a trial judge's role as trier of fact is an important factor in determining recusal.

Though lower federal courts have not determined the exact weight to be given the judge's role as trier of fact, nor stated clear guidelines or analyzed this issue in the context of the *Liteky* standard, many indicate that the judge's role as trier of fact is an important consideration. This Court should consider these cases in determining the standard for judicial recusal in such cases.

In *Alexander v. Primerica Holdings, Inc.*, the Third Circuit required a trial judge's recusal under § 455 because, among other things, he was already on record favoring the defendant on potentially dispositive issues and "the outcome of this case 'would be shrouded [in] suspicion' if [the trial judge] were to continue to preside as trier of fact." The court explained that "[w]hen the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced. . . ." The court held that the judge's comments warranted recusal even though he had presided over the case for four years.[21]

In *Webbe v. McGhie Land Title Co.*, the Tenth Circuit first reversed the trial judge's summary judgment. It then ordered the judge to disqualify himself under § 455 because, having been reversed for granting summary judgment, there was not a reasonable likelihood that he could preside over the trial of the case, in the event that he became the trier of fact, with detachment and objectivity.[22]

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[21] *Alexander*, 10 F.3d 155, 163-66 (3d Cir. 1993). Though the court's decision primarily turned on its supervisory powers as an appellate court, rather than on § 455(a), it, nonetheless, recognized that intrajudicial rulings and comments more significantly threaten a fair trial when the judge is the trier of fact.

[22] *Webbe*, 549 F.2d 1358, 1360 (10th Cir. 1977), cited with approval by Fifth Circuit in *United States v. Harrelson*, 754 F.2d 1153, 1165 (5th Cir. 1985). *Accord United States v. Farid*, 733 F.2d 1318, 1321 (8th Cir. 1984) ("[ordinarily], a district judge who has heard an attempted guilty plea *should not try the case without a jury*"); *United States v. Scaccia*, 514 F. Supp. 1353, 1355-56 (N.D.N.Y. 1981) (trial judge was not disqualified from sitting in criminal prosecution even though he had previously sentenced defendant and presided over defendants probation

In *Camacho v. Autoridad,* the First Circuit held that a trial judge did not have to recuse himself because "the judge performed no factfinding and exercised no discretion."[23]

In holding that a trial judge did not have to recuse himself, the Fifth Circuit explained that ". . . a jury, not the district judge, considered the facts and evaluated the credibility of the witnesses."[24] In upholding the denial of a trial judge's recusal because he had presided over a co-defendant's trial, the Fifth Circuit, quoting the trial court, explained that guilt or innocence will be determined by a jury, not by the court.[25]

3. Other authorities support the recusal of a trial judge when he is trier of fact and has predetermined the issues and expressed class biases.

The American Bar Association Canon for judicial recusal also favors recusal when intrajudicial rulings, comments or opinions indicate that the judge has already formed an opinion on an issue before the issue is

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revocation hearing because the "critical" distinction between the revocation hearing and the trial is that "the *finder of fact* upon the trial here will be the jury, not the court . . . ."); *United States v. Sepulveda*, 512 F. Supp. 592, 594 (D.D.C. 1981) (trial judge need not recuse himself following reversal of conviction and demand for new trial because "[the] Court was *not sitting as the trier of fact* and would not be doing so during the retrial . . . ."). *See also United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (upon remand, "[w]here the judge sits as the *fact-finder*, reassignment is the preferable course, since it avoids any rub-off of earlier error") (all emphases added).

[23] *Camacho*, 868 F.2d 482, 490 (1st Cir. 1989).

[24] *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1412 (5th Cir. 1994).

[25] *United States v. Wilson*, 77 F.3d 105, 110-11 (5th Cir. 1996).

presented to the court.[26] Likewise, as one commentator explained in discussing the standard for recusing federal judges:

> While it may be difficult to prove personal bias when a judge reviews his or her prior decisions, the appearance of partiality exists when a *judge is asked, in effect, to 'second-guess' the prior decision.*[27] (emphasis added)

4. When a trial judge is a trier of fact, the standard for juror impartiality is a relevant consideration.

Because of Judge Smith's role as the sole juror in the FTCA suit, the standard for juror disqualification is relevant and supports his recusal. The Seventh Amendment to the United States Constitution guarantees a party the right to an impartial jury in civil cases.[28] Indeed, the right to trial by an impartial judge "is a basic requirement of due process."[29]

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[26] *Ferry v. Georgia*, 249 S.E.2d 692 (Ga. App. 1978) (applying Georgia Code of Judicial Conduct which adopted 3C(1)(a) of the 1972 ABA Code). *See also*, Leslie W. Abramson, *Studies of the Judicial System: Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct* (2d ed.) (Chicago: American Judicature Society) (1992) at 34. In April 1973, the Judicial Conference of the United States, which governs federal judges, adopted the ABA's proposals for the Code of Judicial Conduct. Wright, Charles Alan , Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters*, § 3541 at 551-52 (1984). Though that involved the 1972 and not the current version of the Code, the relevant Canon regarding disqualification (formerly 3C, now 3E) is identical for purposes of Petitioners' arguments. The 1990 Code is being considered for adopted by the states and federal courts.

[27] Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 Neb.L.R. 1046, 1054 n. 30 (1993).

[28] Amendment VII, U.S. Constitution. *Olson v. Bradrik*, 645 F. Supp. 645, 653 (D. Conn. 1986):

> [The impartiality of the juror] . . . is inherent in the [Seventh Amendment's] right of trial by jury . . [and] it is the role of a district court to safeguard a litigant's constitutional right to an impartial jury during all stages of trial. . . .

[29] *In the Matter of Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955). In *Donovan v. Davis*, the defendant was denied his right to a fair trial when seven persons who served as jurors at an earlier trial of the defendant also served as jurors in a second trial on related issues

Judge Smith is no longer impartial but, as things now stand, he is the only trier of fact Petitioners have for their FTCA case.

5. Judge Smith's predetermination of the key fact issues.

Petitioners' case presents a clear picture why a judge's role as trier of fact requires heightened scrutiny in recusal determination. Judge Smith's prior factual rulings so certainly and completely determine Petitioners' case, that he cannot act as an impartial fact-finder.

In presiding over *United States v. Branch,* the 1994 criminal case against some Branch Davidians,[30] Judge Smith announced *his* factual conclusions, mostly during sentencing, which predetermine the key, disputed fact issues in Petitioners' case. On the important disputed issues regarding the U.S.' February 28 assault, he concluded that (1) the Branch Davidians "ambush[ed]" the ATF agents on February 28, 1993; (2) they engaged in a "conspiracy to cause the deaths of federal agents;" (3) they shot first without adequate provocation; (4) "the first shots were fired from inside the front door of the compound;" (5) the Davidians were committed to "bring[ing] about a violent conflict with federal agents" and "forc[ed] the agents to use deadly force against them;" (6) the ATF's search and arrest warrants were legal; (7) the ATF Agents complied with

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and

> . . . more likely than not . . ., consciously or unconsciously, the jurors, in making the credibility determination which was the essential issue in the second trial, were influenced by the evidence that they had heard at the first.

558 F.2d 201, 202 (4th Cir. 1977). *See also Leonard v. United States*, 378 U.S. 544, 544-45, 84 S. Ct. 1696 (1964) (prospective jurors, who have sat in a courtroom and heard a verdict returned against a man charged with a crime in a similar case immediately prior to the trial of another indictment against him, should be automatically disqualified from serving at the second trial); *United States v. Stratton*, 649 F.2d 1066, 1082 (5th Cir. 1981); *Government of the Virgin Islands v. Parrott*, 551 F.2d 553, 554 (3d Cir. 1977) (it violates Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if cases are proximate in time).

[30] Only four of the hundreds of Petitioners were defendants in *Branch* and the jury acquitted two of those Petitioners.

statutory and constitutional "knock and announce" requirements when serving the warrants; and (8) but for skilled lawyering by defense counsel in *Branch*, the jury would have convicted more defendants of murder.[31] He talked emotionally about gruesome photos of dead ATF agents and vividly described his belief that the Branch Davidians shot a helpless ATF agent.[32] Judge Smith has not limited these opinions to the *Branch* defendants, but has concluded that many of the Branch Davidian decedents, whose estates are Petitioners in these civil cases, were equally guilty of "ambushing" and "conspir[ing] to cause the death of" ATF agents.[33]

Regarding federal agents' April 19, 1993 assault, Judge Smith has already decided that (1) the Branch Davidians started the April 19, 1993 fire; (2) they were heard on the FBI surveillance tapes planning a fire; and (3) they "murder[ed]" each other.[34] His conclusion that the Branch Davidians murdered each other means that he has already decided that they intentionally and maliciously killed themselves and each other.

As to the Branch Davidians' religious beliefs and practices, Judge Smith's *Branch* conclusions were that the Davidians (1) defrauded credit card companies of "huge sums" of money to "acquire an armory that would rival that of the National Guard unit's . . . ." (2) turned Mount Carmel, their place of worship and home for their families, into "a literal fortress;" (3) practiced a religion designed to "bring about a violent conflict with federal agents;" and (4) had "ammunition in an unbelievable quantity."[35]

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[31] Appendix D, pp. 25a - 27a, Appendix E, pp. 28a - 29a, and Appendix J, pp. 61a - 63a.

[32] Appendix E at p. 29a.

[33] Appendix D, pp. 25a - 27a.

[34] Appendix D, pp. 25a - 27a, and Appendix E, pp. 28a - 29a.

[35] Appendix D, pp. 25a - 27a.

Judge Smith is so certain of his factual conclusions that he restated some of them in his summary judgment in *Risenhoover v. Cox,* a case brought in his Court by ATF agents and their families against various media organizations and an ambulance company, alleging that these defendants alerted the Branch Davidians to the ATF's February 28 assault and, thereby, caused ATF injuries and deaths. Judge Smith concluded that (1) the Branch Davidians started the April 19, 1993 fire; (2) they had to be "surprise[d]" by the ATF's assault or lives would be lost; (3) Koresh was a "false prophet;" (4) they ignored the "Golden Rule" and focused on paramilitary training; and (5) the Branch Davidians shot first on February 28, 1993, without adequate provocation.[36]

Judge Smith independently reached all these conclusions about what happened on February 28 and April 19, 1993, and about the Branch Davidians' lifestyle and religion.[37] They were not in, or necessary to, the *Branch* jury's verdict.[38]

Of course, Petitioners oppose all these conclusions by Judge Smith. They have alleged and will prove that the (1) Branch Davidians were a peaceful group which previously had good and cordial relations with local law enforcement and were sincere biblical students; (2) the ATF's February 28 assault was executed with excessive force, including the ATF firing the first shots without adequate provocation; and (3) the U.S.' April 19 assault was executed with excessive force, caused the April 19 fire, crushed Mt. Carmel, and introduced toxic gases. This fire, structural collapse, and gas caused the deaths of many Branch Davidians. The U.S. also shot to death some Branch Davidians on April 19. Others, who died of gun shots on April 19, committed suicide or died in a mercy killing because that was a better choice than a painful death by fire which they faced because the United States trapped them in Mt. Carmel. In no event

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[36] Appendix H, pp. 56a - 59a.

[37] *See United States v. Mergerson*, 4 F.3d 337, 343 (5th Cir. 1993).

[38] Appendix F, pp. 30a - 49a, and Appendix G, pp. 50a - 55a.

were their deaths the result of Branch Davidian "murdering" Branch Davidian.

6. Judge Smith's February 18, 1997 Order does not explain how a fair trial before him is still possible.

Judge Smith, in his February 18, 1997 Order denying recusal, responded to Petitioners' arguments that he is biased. He claimed that the *Risenhoover* parties did not contest the issue of who started the fire. However, this was not even an issue in *Risenhoover* and, thus, there was no need for him to rule that the Branch Davidians started the fire. That Judge Smith did so rule, even when it was completely irrelevant to the case, shows how committed he is to his opinion, how frequently he has put himself on record that the Branch Davidians started the fire, and how difficult it will be for Petitioners to convince *him* otherwise.

Judge Smith further responds that if the issues raised by Petitioners are supported by evidence that was not introduced in either *Branch* or *Risenhoover,* he will weigh and evaluate it as any other evidence. However, that is an unfairly biased standard of proof. With any other judge, and with any fairly chosen juror, all of Petitioners' evidence would be considered objectively and collectively in determining whether they have proved their case. With Judge Smith as their sole FTCA juror, Petitioners start with much of their evidence rejected prior to submission and with their new evidence viewed in isolation.

Further, Judge Smith inevitably will view even new evidence with his predispositions, biases, and prior conclusions from *Branch* and *Risenhoover*, or at least it will appear so to a reasonable person. In determining whether evidence is "new" and whether it distinguishes Petitioners' record from that of *Branch*, Judge Smith cannot be impartial and certainly cannot appear impartial to a reasonable person. On the other hand, a new fact-finder and decision-maker — untainted by other

proceedings and extrajudicial information — would be more able to view the evidence objectively, wholly and without predispositions.[39]

Judge Smith also claims that his *Branch* rulings do not preclude his objectivity in Petitioners' cases because the *Branch* defendants did not make a "concerted" effort to present "actual" evidence "contest[ing]" that the Branch Davidians fired first, that the Branch Davidians started the fire, and that the teachings of David Koresh were "para-military."[40] However, affidavits from the jury foreperson and examination of the *Branch* transcripts reveal these were hotly contested issues at trial, even with the very limited discovery available to the criminal defendants. As an example, Petitioners will discuss the evidence submitted in *Branch* contesting who shot first during the February 28, 1993 assault.

7. "Actual" evidence "contest[ing]" who shot first on February 28, 1993.

The events of February 28, 1993, were contested enough in *United States v. Branch* that, in the appeal to the Fifth Circuit, one dissenting judge concluded that there was a jury issue whether the Branch Davidians shot in self-defense on February 28. Justice William Schwarzer stated that (1) there was no evidence that any of the individual *Branch* defendants provoked the shooting; (2) there was conflicting evidence as to whether the first shot came from inside or outside Mt. Carmel; (3) no evidence identified any of the individual defendants as firing the first shot; and (4) the evidence "portrays a scene of great complexity and confusion [and] [d]eciding who shot first based on that evidence requires a difficult factual determination that ... should have been left to a jury." He concluded that there was enough evidence to permit a reasonable jury

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[39] The appeal of a judge's refusal to recuse himself always involves a judge who says and may believe that he can, despite his biases, predispositions and/or prior decisions, still decide a case fairly and, despite the appearance of bias, still protect the integrity of the judicial system. Thus, a judge's opinion of his bias cannot be controlling.

[40] Addendum C at p. 17a.

to have a reasonable doubt whether the ATF agents used excessive force.[41]

Judge Schwarzer also pointed to the contradictory testimony of ATF agent Roland Ballesteros (who was the prosecution's key witness testifying that the Branch Davidians shot first) and to Branch Davidian Jaime Castillo's post-arrest statement that the ATF shot first.

He further concluded that there was ample testimony from Branch Davidians Kathryn Schroeder and Majorie Thomas that the ATF agents fired indiscriminately through the windows and walls from which no gunfire originated and there was substantial evidence that during the gun battle the *Branch* defendants were in the same area as Schroeder and Thomas. Thus, he concluded, there was sufficient evidence to raise a jury issue as to whether the defendants were merely responding to this indiscriminate gunfire.[42]

The *Branch* jury forewoman, Sarah Bain, has testified by affidavit in support of the Petitioners' recusal motion that the jury concluded that (1) the ATF provoked the Branch Davidians on February 28, 1993; (2) raid planners for both the ATF and FBI should have been tried for their acts; (3) the defendants never planned or intended to murder anyone; (4) if the jury had understood that self-defense applied to the voluntary manslaughter charge, they would have acquitted the defendants of that charge as well; (5) the jury never intended the conviction on Count 3 (the carrying of a firearm) to be considered conviction of conspiracy to commit murder (which is how Judge Smith eventually interpreted it); and

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[41] *United States v. Branch*, 91 F.3d 699, 747 (5th Cir. 1996).

[42] *Branch*, 91 F.3d at 749 and n.5. Though the majority of the *Branch* panel disagreed with Judge Schwarzer, the fact that he concluded that there was a jury issue on self-defense means this issue was at least "contest[ed]" with "actual evidence," it was not stipulated to by the *Branch* defendants, as Judge Smith implies, and Judge Smith made a factual determination based on contested evidence.

(6) the jury did not decide that the Branch Davidians shot first on February 28.[43]

Agent Ballesteros, the prosecution's key witness on the assault, had testified in pre-trial proceedings that, as he was approaching Mt. Carmel's front doors, the Davidians shot first by firing a barrage of bullets through the right front door.[44] However, Jack Zimmermann, a former Marine officer experienced in gunfire, testified at the trial that he examined the right front door during the siege and found only bullet holes protruding inside, that is, holes made by gunfire from the outside, not from the inside, of Mt. Carmel.[45] If there were not multiple bullet holes protruding outward, then Agent Ballesteros is wrong in his testimony and that at least created an actual factual contest as to who shot first.[46]

Petitioners have more evidence than did the *Branch* defendants which disputes Judge Smith's factual conclusions on this and other key issues, and they have presented that evidence in opposition to the U.S.' summary judgment motions. Unfortunately, unless Judge Smith is recused or this case is reassigned, the evidence gathered by the Petitioners will not be considered by an impartial trier of fact, but will instead have to overcome Judge Smith's firmly-held convictions derived from proceedings and sources in which Petitioners had no part and derived from his unfair biases.

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[43] Appendix K, pp. 64a - 66a.

[44] Appendix L, p. 67a.

[45] Appendix M, pp. 68a - 71a. Mr. Zimmermann was Branch Davidian Steven Schneider's attorney. He met with him at Mt. Carmel during the siege, with the FBI's permission, and, while there, he inspected the right front door.

[46] The right front door of Mt. Carmel — a critical piece of evidence — was somehow lost by the United States and not available during the *Branch* trial.

8. Judge Smith's extrajudicial communications and knowledge.

Judge Smith's has not only expressly prejudged the factual issues, he has relied on extrajudicial communications with Defendants and hearsay to reach his prior decisions.

a. Judge Smith's extrajudicial communications with Defendants the United States and William Johnston.

Two days before the ATF's February 28, 1993 attempt to execute the warrants, Judge Smith extrajudicially conferred with two Waco AUSAs — William Johnston (a Defendant in these cases) and John Phinizy. They discussed planning for the assault, particularly problems the U.S. was having with the local newspaper running a story which the AUSAs thought would alert the Davidians to the impending ATF raid. The next day — the day of the assault — Judge Smith likewise told his brother that, if anyone was hurt in the February 28, 1993 assault, "he would lay responsibility at the door of the newspaper."[47]

Given these extrajudicial conversations and opinions, a reasonable person would doubt Judge Smith's objectivity because by February 28, 1993, he believed (1) the newspaper might alert the Branch Davidians to the impending assault and (2) the alert mattered because, as Johnston and Phinizy had at least implied, once alerted, the Branch Davidians would ambush the ATF. Indeed, the only reasonable way the newspaper could be responsible for injuries, as Judge Smith concluded they would be, is if, once alerted, the Davidians reacted violently to the ATF's attempt to execute the warrants. Relatedly, it reasonably appears that, by blaming the newspaper, Judge Smith has already rejected the possibility that the ATF could be at fault because of its excessive force in serving the arrest and search warrants or its communications with the newspaper.

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[47] Appendix C, Exhibit 1, pp. 23a - 24a. There is no apparent legal reason for these conferences. Magistrate Dennis Green of the Waco Division, not Judge Smith, signed the warrants for the February 28 assault. Appendix I, p. 60a.

These extrajudicial briefings and Judge Smith's opinions would also cause a reasonable person to believe that even more was said to him which would adversely affect his impartiality in Petitioners' case.[48] Indeed, Judge Smith is an obvious target for a deposition regarding the ATF's planning of the February 28 assault, an uncomfortable prospect for Petitioners if he is to act as the judge and jury in their FTCA case.

b. Judge Smith's conclusions based on extrajudicial hearsay.

Judge Smith admits in his February 18, 1997 Order denying recusal that he relied on *Waco Tribune-Herald* newspaper articles, attached to a *Risenhoover* pleading, to support his negative views of the Davidians' religious beliefs and lifestyle which he expressed in his *Risenhoover* summary judgment.[49] Regardless of whether it was filed, this is extrajudicial information and Judge Smith's acceptance of it as truth, before Petitioners have even presented their evidence, further supports his unfair bias and appearance of bias and requires his recusal.

9. Judge Smith has demonstrated a class bias against the Davidians.

Judge Smith's statements demonstrate a "class" bias against the Petitioners, further making him inappropriate as a judge in this case,

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[48] In *In re Faulkner*, the court issued a writ of mandamus ordering the trial judge recused because, in part, the judge's relative had

> . . . communicated to the judge, substantially though maybe not extensively or in great detail, material facts and her opinions and attitudes regarding those facts [and recusal is required] . . . even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge. . . .

856 F.2d 716, 721 (5th Cir. 1988).

[49] These articles were the paper's "Sinful Messiah" series on David Koresh and the other Branch Davidians.

much less the trier of fact. In *Berger v. U.S.*,[50] this Court held that the movant alleged facts that, if true, clearly showed that the challenged judge regarded all Germans with contempt when he said, among other things, "[o]ne must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country [because] . . . their hearts are reeking with disloyalty."[51] The *Liteky* majority cited *Berger* as the type of case where intrajudicial remarks manifested such a high degree of antagonism as to make fair judgment impossible.[52] *Liteky* also gave, as example of situations that generally warrant recusal, a judge who, during a trial, learns for the first time about an obscure religious sect and acquires a passionate hatred for all its adherents.[53]

Similarly, Judge Smith's comments in *Branch* and *Risenhoover* reflect his belief that the Davidians were disloyal to the U.S. government and insincerely practiced a false religion. In those cases, he concluded that the Davidians, as a group, were "committed to bring[ing] about a violent conflict with federal agents," turned their home into a "literal fortress," and ignored the "Golden Rule" while engaging in "paramilitary training." He labeled those who wrote him in support of the *Branch* defendants as "anti-government." To a reasonable observer, Judge Smith has animus towards the Branch Davidians as a class, and that animus will likely be translated to individual members of the sect and their relatives.

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[50] *Berger*, 255 U.S. 22, 41 S. Ct. 230 (1921).

[51] *Berger*, 255 U.S. at 28, 41 S. Ct. at 231.

[52] *Liteky*, 510 U.S. at 555, 114 S. Ct. at 1157. *See Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1051 (5th Cir. 1975). Certainly an individual's bias against a class suffices to disqualify her as a juror.

[53] *Liteky*, 510 U.S. at 550, 114 S. Ct. at 1154.

B. Federal Courts Should Exercise Their Supervisory Powers and Order the Case Reassigned on Remand to a Different Judge Where The Trial Judge, Who Will Also Be The Sole Trier of Fact, Has, During a Prior Case, Already Decided the Key, Disputed Fact Issues And Expressed Strong Negative Views About a Class of People to Which Petitioners Belong.

To correct this type of extreme departure from judicial procedure and abuse of due process which has occurred in Petitioners' case, federal courts have supervisory powers, beyond their powers under the recusal statutes, to order the case reassigned to another judge. However, lower federal courts also have little guidance on how to use their supervisory power when the trial judge, who has predetermined facts and evidenced class biases, acts as the trier of fact. This Court should clarify that guidelines for reassignment require reassignment in this case. If not this case, then what case?

In *Liteky*, this Court held that federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone, but on the appellate courts' statutory power to "'require such further proceedings to be had as may be just under the circumstances'." This Court recognized that this holding "may permit a different standard [from recusal], and there may be pragmatic reasons for a different standard."[54]

Given these holdings, and that Petitioners sought recusal at the very outset of these cases and before Judge Smith had become heavily immersed, the healthy administration of the judicial process requires

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[54] *Liteky*, 510 U.S. at 554, 114 S. Ct. at 1157. *See also United States v. Anderson*, 70 F.3d 353 (5th Cir. 1995) (even though judge did not violate the Sixth Amendment or the Due Process Clause, court ordered assignment to a new judge for sentencing); *Jordan*, 49 F.3d 152, 160 (5th Cir. 1995) (court found no evidence of judicial bias but ordered reassignment to a new judge outside of the district for sentencing to avoid the appearance of bias); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97-98 (3d Cir. 1992) (in suit against tobacco companies, the court ordered reassignment of case to a different district judge to preserve the appearance of impartiality, given the judge's intrajudicial opinions critical of the tobacco industry and press reports of same). *See* 28 U.S.C. § 2106.

reassignment to another judge, even if the Fifth Circuit and this Court concludes that Petitioners did not demonstrate that disqualification is mandated by the recusal statutes or Due Process Clause.

II. There Is An Uncertainty Among The Circuit Courts As To The Weight To Give The Judge's Role As Trier Of Fact.

The second reason the writ should be granted is, though most courts that have considered this issue hold that the judge's role as trier of fact is in some way relevant to determining his recusal, other courts have denied a recusal motion when the judge, who has predetermined fact issues in one case, then acts as trier of fact in a successive, related case on the same issues.[55] This uncertainty among the circuits as whether this is even a relevant factor should be resolved by this Court.

III. The Decision Dismissing Petitioners' Appeal Violated Their Right To Due Process And Is Such An Extreme Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The third reason the writ should be granted is that the Fifth Circuit's refusal to recuse Judge Smith not only violated Petitioners' right to due process, but it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This Court should grant a writ to prevent such an extreme departure from the accepted and usual course of judicial proceedings which require that a party have a fair and impartial fact-finder, as well as presiding judge, in her case.

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[55] *United States v. Reeves*, 782 F.2d 323, 325 (5th Cir. 1986); *Blizard v. Frechette*, 601 F.2d 1217, 1219 (1st Cir. 1979).

A. Judge Smith's Predetermination of Key Fact Issue and His Class Bias Toward the Petitioners Require Reassignment.

In Petitioners' case, the Fifth Circuit has sanctioned a procedure where (a) a judge sits as trier of fact on the case when he has already predetermined the key fact issues in a prior case to which almost all of the current parties were not parties; (b) he has extrajudicially conferred with some of the defendants and reached conclusions about who would be to blame, even before the events which are the subject of the suit occurred; (c) he has based his opinions against the Petitioners on a hearsay newspaper article, and (d) he has negatively described Petitioners in broad, class-wide terms.

B. Judge Smith's Personal Ties to Defendants Sessions and Johnston.

Unless Judge Smith is recused or Petitioners' case reassigned, Judge Smith will also preside over the high profile civil prosecution of former FBI Director William Sessions who for many years was Judge Smith's federal bench colleague and Chief Judge.[56] This case should be sent to other judges in the Western District who did not serve with or under Judge Sessions and would not be burdened by the bias and appearance of bias in this case. (Of course, other judges in other Texas districts did not serve with or under Judge Sessions.) Judge Smith also will preside over the prosecution of AUSA William Johnston, who extrajudicially briefed Judge Smith about the February 28 assault before it happened and conveyed to Judge Smith his view that the Davidians would ambush the

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[56] Petitioners are entitled to a jury trial on their claims against these Defendants. *Jordan*, 49 F.3d at 160 n. 18 (after reversing a judge, court reassigned case on remand to a different judge outside the recused judge's district for resentencing because of the apparent reluctance of the judge's colleagues to challenge her previous sentencing). *See also United States v. Singer*, 575 F. Supp. 63, 67-68 (D. Minn. 1983) (judge recused self because actions of his chief judge were relevant to inquiry, chief judge may be called as witness and trial judge would have to rule on admissibility of chief judge's testimony; court concluded that judge outside of district should preside).

ATF if the local newspaper alerted them to the assault. This is a view Judge Smith adopted in his subsequent conversation with his brother.[57]

Judge Smith, in his February 18, 1997 Order, relied on *United States v. Harrelson*, which held that, though the presiding judge had been a colleague of an assassinated judge for eight to nine years, recusal was not required in the murder trial;[58] on *United States v. Lovaglia,* which held that recusal was not required where the presiding judge's former law firm represented a victim of the defendant's criminal activity and the judge had been involved in a business and social relationship with a shareholder in one of the victim's companies;[59] and on *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.,* where the judge had social contacts with attorneys representing the plaintiffs.[60] However, in none of these cases was the judge the sole trier of fact and his connection was not as direct in that he was not presiding over the prosecution of a judicial colleague and former superior.

In *Harrelson,* the Fifth Circuit explained that whatever the relationship between the two judges, it would at most create hostility towards the actual killers, not necessarily the defendant, and the presiding judge would be committed to seeing that the guilty, rather than the not guilty, be convicted.[61] However, in Petitioners' cases, there will be no doubt that Judge Smith could be sympathetic toward defendants, Judge Sessions and Johnston, and that creates, at least, an impermissible appearance of partiality.

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[57] Appendix C, Exhibit 1, pp. 23a - 24a.

[58] *United States v. Harrelson*, 754 F.2d 1153 (5th Cir.), *cert. denied*, 474 U.S. 908 and, *cert. denied*, 474 U.S. 1034 (1985).

[59] *Lovaglia*, 954 F.2d 811 (2d Cir. 1992).

[60] *Liljeberg*, 38 F.3d at 1409.

[61] *Harrelson*, 754 F.2d at 1166.

CONCLUSION

This Court has given little guidance to lower courts in determining recusal or reassignment when a judge is also the sole juror. For example, how is the *Liteky* standard for recusal based on intrajudicial rulings applied and when is reassignment required?

Even if this Court were to consider recusal or reassignment in this case to be a close call, it should order recusal or reassignment.[62] Given the current number of federal judges and rapid transportation, the burden on the judiciary from disqualification is much less than it was and "any inconvenience which does arise is more than outweighed by the need to protect the dignity and integrity of the judicial process."[63] Further, though a single fact may not warrant disqualification, a combination of events, acts, connections and predeterminations, like those in Petitioners' case, must prevent a judge from continuing to participate in a case and certainly from acting as the sole trier of fact.[64]

Petitioners simply want their day in court before a *tabula rasa* — a judge and fact-finder who have not already decided against them — and they are willing to be sent to any other federal district court to get that fair tribunal.[65]

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[62] *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980) (it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case). *See also Matter of Billedeaux*, 972 F.2d 104, 106-107 (5th Cir. 1992) (DeMoss, J., dissenting) (when issue of disqualification is raised prior to trial, the call in close cases should lean towards recusal as a matter of efficient administration, thereby insulating the case from waste and inefficiency if it is later determined that § 455 had not been satisfied).

[63] *Potashnick*, 609 F.2d at 1112.

[64] *See Mayberry v. Pennsylvania*, 400 U.S. 455, 465, 91 S. Ct. 499, 505 (1971).

[65] Mandamus was the appropriate method for seeking Judge Smith's recusal in the Fifth Circuit, as Petitioners have no adequate appellate remedy. The Defendants did not argue otherwise. *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995); *Faulkner*, 856 F.2d at 721.

Petitioners request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

Michael A. Caddell
Attorney of Record for Petitioners
Joe Phillips
Caddell & Chapman

Attorney-in-Charge for Plaintiffs and Petitioners in *Andrade, Ferguson, Gyarfas, Martin, Riddle* and *Sylvia* and Lead Counsel for the *Holub* cases

Ramsey Clark
Lawrence W. Schilling

Attorney-in-Charge for Plaintiffs and Petitioners in *Brown*

OF COUNSEL:

Kirk Lyons
CAUSE Foundation

James Brannon

Scott McQuaig
Russell Solomon

Date: September 6, 1997

APPENDICES

APPENDIX A

LIST OF PARTIES

The following listed persons have an interest in the outcome of these cases.

A. THE DISTRICT COURT JUDGE IN PETITIONERS' CASE IS

Hon. Walter S. Smith, Jr.

B. THE *ANDRADE* PETITIONERS (PLAINTIFFS IN THE DISTRICT COURT)

The following Petitioners are from *Andrade v. Chojnacki* (W-96-CA-139); *Holub v. Reno* (W-96-CA-140); *Ferguson v. Reno* (W-96-CA-141); *Riddle v. Reno* (W-96-CA-143); *Gyarfas v. Reno* (W-96-CA-144); *Martin v. U.S.* (W-96-CA-145); *Holub v. U.S.* (W-96-CA-146); and *Sylvia v. U.S.* (W-96-CA-373) (the "Andrade Petitioners"):

(a) The following estate claims are brought by Administrators Tracey Conwell, Stephen Thompson, Jean Holub and/or Bobby Wayne Howell: Estate of Chanel Andrade, Estate of Jennifer Andrade, Estate of Katherine Andrade, Estate of Crystal Jewel Barrios, Estate of Isaiah Barrios, Estate of Alrick George Bennett, Estate of Susan Marjorie Benta, Estate of Winston Blake, Estate of Mary Jean Estella Borst, Estate of Pablo Cohen, Estate of Beverly Adore Elliott, Estate of Doris Adina Fagan, Estate of Yvette Williams Fagan, Estate of Peter Bruce Gent, Estate of Sandra Elaine Hardial, Estate of Diana Henry, Estate of Paulina Henry, Estate of Phillip G. Henry, Estate of Stephen G. Henry, Estate of Vanessa Henry, Estate of Zilla Henry, Estate of Peter Hipsman, Estate of Star Hadassah Howell, Estate of Cyrus Ben Joseph Howell, Estate of Sherry Lynn Gallegos Jewell, Estate of Bobby Layne Koresh, Estate of Dayland Lord Little, Estate of Kara Brittani (Pages) Little, Estate of Jeffrey Curtis Little, Estate of Nicole Elizabeth Gent Little, Estate of Livingston A. "Mike" Malcolm, Estate of Daisy Martin, Estate of Abigail Martinez, Estate of Audrey Martinez, Estate

of Joseph Martinez, Estate of John McBean, Estate of Allison Bernadette Monbelly, Estate of Rosemarie Morrison, Estate of Melissa Morrison, Estate of Beryl Theresa Nobrega, Estate of James Loye Riddle, Jr., Estate of Julie Santoya, Estate of Judy Violet Peterson Schneider, Estate of Mayanah Schneider, Estate of Steven Schneider, Estate of Michael Schroeder, Estate of Clifford Gary Sellors, Estate of Aisha Gyarfas Summers, Estate of Gregory Allen Summers, Estate of Startle Summers, Estate of Hollywood Sylvia, Estate of Lorraine Sylvia, Estate of Rachel Ester Sylvia, Estate of Jaydean Wendel, and Estate of Mark Wendel.

(b) The following individuals have also brought claims: Joseph W. Allen, Norman Washington Allison, Guillermo Andrade, Isabel Andrade, Jacqueline Andrade, Shelly Ausloos, Thomas Barrios, Darren Bennett, Nicole Bennett, Rhyce Gordon Bennett, Alfred LeRoy Benta, Arthur Heard Benta, Leyton Eustace Benta, Marjorie E. Benta, Adeline Sylvia Black, Lowess Esmerella Blake, Robert Theophilus Blake, Bradley Borst, Darren Borst, Lance Borst, Debborah K. Brown, Sherry Ann Burgo, Patricia Fagan Clarke, Jorge Cohen, Raul Cohen, Shulamit Cohen, Sandra J. Connizzo, Donell K. Cornwell, Leanora Laura De Silva, Joaquin Dones, Margie Douglas, Olive Jeanie Dunn, Devon Nathanuel Elliott, Wendel Augustus Elliott, Sonia Elseth, Bloston N. Fagan, Delroy Fagan, Fitz Ernest Fagan, Livingston Fagan, Nehara Fagan, Patrick Nathaneal Fagan, Renae Fagan, Robert Fagan, Roslyn Fagan, Rrenford Fagan, Misty Dawn Ferguson, Paulette Brenda Gdaniec, Elizabeth Gyarfas, Oliver Gyarfas, Sr., Joshua Hardial, Una Hardial, Donaire Harty, Noel Harty, Berry Haugen, Clifford "Gordie" Haugen, Curtis Haugen, Doris Haugen, Glen Haugen, Samuel Oresta Henry, Catherine Hipsman, Eugene Hipsman, Jr., Eugene Hipsman, Filomena Hipsman, John Charles Hipsman, Michael Ralph Hipsman, Mildred Hipsman, Paul John Hipsman, Stephan M. Hipsman, Pearl Horsfield, Lucilda McBean Hosten, Dana Houtman, Floyd Houtman, Jr., Gabriella Marie Houtman, Joel Matthew Houtman, Judith Marie Houtman, Tobias Hosea Houtman, Marie Cornwell Hutchison, Sue Johnson, Samuel N. Jones, Aaron Jay Little, Lonnie C. Little, Patricia May Little, Stuart A. Little, Derek Lovelock, Christyn Mabb, Jacob Mabb, Scott Mabb, William Mabb, Gail Magee, Solomon Malcolm, Jr., Solomon Malcolm, Sr., Helen Martin, Joseph W. Martin, JoAnn Martin, Dr. Norman J. Martin, Daniel Martinez, Sr., Daniel Martinez, Jr., Lucille Maynard, Ransford McBean, Gail Monbelly, Josephart

Monbelly, Mary Anna Monbelly, J. P. Morrison, Michael Morrison, N. A. Morrison, Ruth Mosher, Andrew Vincent Nobrega, Natalie Priscilla Nobrega, Vincent Nobrega, Wayne C. Nobrega, Christian Andrew Olsen, Margaret Parker, David Pearce, Jr., Julie Pearce, Earl Peterson, Wayne F. Peterson, Shirley Puttkammer, Sidnee Reamer, Anetta Robinson Richards, James Loye Riddle, Sr., Myrtle Ann Riddle, Rita Faye Riddle, Ruth Ottmann Riddle, Joe Santoya, Emil Schneider, Patricia Schneider, Bryan Schroeder, James Schroeder, Kathryn Schroeder, Robert A. Schroeder, Scott Schroeder, Geoffrey N. Sellors, Marjorie Sellors, Karen Shigeta, Edna Summers, Jeffrey Summers, Michael L. Summers, Randall Kevin Summers, Terry Dean Summers, Joshua Sylvia, Stanley Sylvia, Marjorie Venetia Thomas, Marlene Ann Thompson, Peggy Puttkammer Weishoff, Alma K. Wendel, Jaunessa Wendel, Kurt Wendel, Landon Wendel, Patron Wendel, Robert Wendel, Tamarae Wendel, Agatha Myrtle Williams, and Gladys Williams.

(c) The *Andrade* Petitioners are represented by the following counsel:

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(d) The following person is the trustee for the bankruptcy estate of *Andrade* Petitioner Sam Jones:

Ronald R. Sticka
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C. THE *BROWN* PETITIONERS (PLAINTIFFS IN THE DISTRICT COURT)

The following Petitioners are from *Brown v. United States* (WA-96-CA-142 and W-96-CA-147) (the "*Brown* Petitioners"):

(a) The following estate claims are brought by either the estates' heirs or by Administrators Bonnie Haldemann, Clive Doyle or Marybelle Jones: Estate of Chanel Andrade, Estate of Shari Doyle, Estate of Lisa Marie Farris, Estate of Raymond Friesen, Estate of Peter Gent, Estate of Novelette Sinclair Hipsman, Estate of Floyd Houtman, Sr., Estate of Star Hadassah Howell, Estate of David Jones, Estate of Perry Jones, Estate of Cyrus Ben Joseph Koresh, Estate of Bobbie Lane Koresh, Estate of Chica Jones Koresh, Estate of David Koresh, Estate of Dayland Gent Koresh, Estate of Little One Jones Koresh, Estate of Michelle Jones Koresh, Estate of Nicole Gent Koresh, Estate of Paiges Koresh, Estate of Rachael Jones Howell Koresh, Estate of Serenity Sea Jones Koresh, Estate of Anita Martin, Estate of Douglas Wayne Martin, Estate of Lisa Martin, Estate of Sheila Martin, Estate of Wayne Joseph Martin, Estate of Abegail Martinez, Estate of Audrey Martinez, Estate of Crystal Martinez, Estate of Isaeh Martinez, Estate of Joseph Martinez, Estate of Juliette Santoyo Martinez, Estate of Rebecca Saipaia, Estate of Mayana Schneider, Estate of Scott Kojiro Sonobe, Estate of Floreceta Rivera Sonobe, Estate of Startle Summers, Estate of Margarida Gehrmann Vaega, and Estate of Neil Vaega.

(b) The following individuals also have brought claims: Grace Jasmine Adams, Debborah Brown, Robyn Bunds, Sherry Houtman Burgo, Clive Doyle, Edna Doyle, Karen Doyle, Katherine Farris, Tillie Friesen, Ursula Gehrmann, Bruce Gent, Bonnie Haldeman, Dana Houtman, Floyd Houtman, Jr., Heather Jones, Joel Jones, Kevin Jones, Mark Jones, Mary Belle Jones, Shaun Wisdom Howell Koresh, Derek Lovelock, Daniel Martin, James Martin, Kimberly Martin, Sheila Judith Martin, Dana Okimoto, Jared Michael Okimoto, Sky Born Okimoto, Anacleto Rivera, Elpedio Rivera, Cirila Rivera, Emmanuel Rivera, Jessie Rivera, Joel Rivera, Rene Rivera, Rose Rivera, Lona Saipaia, Sina Saipaia, Willie Saipaia, Ofilia Santoyo, Dorothy Forde Sinclair, John Sinclair, Reginald Sinclair, Angelica Sonobe, Crystal Sonobe, Kenneth Goro Sonobe, David Thibodeau, Albert Vaega, Allen Vaega, Aualepoia Vaega, George Vaega, Joann Vaega, Leslie M. Vaega, Nese Vaega, Vailoa Vaega, Collette Sinclair Wynn, The General Association of the Branch Davidian 7th Day Adventist.

(c) The *Brown* Petitioners are represented by the following counsel:

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D. RESPONDENTS (DEFENDANTS IN DISTRICT COURT)

1. ***Bivens*, §§ 1983 and 1985(3), and RICO Defendants** (These defendants are identified by the position they held at all relevant times to these cases.):

    1. Davy Aguilera — Bureau of Alcohol, Tobacco & Firearms ("ATF") agent.
    2. Robert Balderson — Texas National Guard.
    3. Robert Bernhart — Texas National Guard.
    4. William Buford — ATF agent.
    5. James Cavanaugh — ATF agent.

6. Phillip J. Chojnacki — ATF agent.
7. Daniel Edward Conroy — ATF Deputy Associate Director for Law Enforcement.
8. Edward S. G. Dennis, Jr. — Private individual on contract to the United States Department of Justice.
9. Bryan Dickens — Texas National Guard.
10. Earl Dunagan — ATF agent.
11. Darrell Dyer — ATF agent.
12. Darwin Finch — Texas National Guard.
13. Jeffrey Freelove — Texas National Guard.
14. Timothy Gaborie — ATF agent.
15. Fernando Grajales — Texas National Guard.
16. Daniel M. Hartnett — ATF Associate Director of Law Enforcement.
17. Stephen E. Higgins — Director of the ATF.
18. Lon T. Horiuchi — Federal Bureau of Investigation ("FBI") agent.
19. Webster L. Hubbell — Associate United States Attorney General.
20. Stanley Huntley — Texas National Guard.
21. Jeffrey J. Jamar — FBI agent.
22. William Johnston — Assistant United States Attorney for the Western District of Texas.
23. Peter B. Mastin ATF agent.
24. John McGaw — Director of the ATF.
25. William Pettit — Commander of the Texas National Guard.
26. Lawrence A. Potts — Assistant Director of the Criminal Investigative Division of the FBI.
27. Janet Reno — Attorney General of the United States.
28. Oliver B. Revell — FBI agent.
29. Tommy Reynolds — Texas National Guard.
30. Ann Richards — Governor of the State of Texas.
31. Robert A. Ricks — FBI agent.
32. Robert Rodriguez — ATF agent.
33. Richard Rogers — Commander of the FBI's Hostage Rescue Team.
34. Ted Royster — ATF agent.
35. Byron Sage — FBI agent.
36. Charles Sarabyn — ATF agent.

37. Jerry Segraves — Texas National Guard.
38. William S. Sessions — Director of the FBI.
39. Doyle Stone — Texas National Guard.
40. Gino Trevino — Texas National Guard.
41. David C. Troy — ATF Chief of Intelligence.

2. FTCA Defendant

The FTCA Defendant is the United States of America.

3. Counsel for Defendants/Respondents

Defendants are represented by the following counsel:

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50255

In Re: ISABEL G ANDRADE; DEBORAH BROWN; JEAN HOLUB, Co-Administrators and Legal Representatives of the Estates of Bobbie Layne Koresh, Star Hadassah Howell and Cyrus Ben Joseph Howell, Minor Children Deceased; JAMES LOYE RIDDLE; MISTY DAWN FERGUSON; OLIVER GYARFAS, ET AL Individually and as Administrator of the Estate of Aisah Gyarfas Summers, Deceased and the Estate of Startle Summers, Deceased

Petitioners

Petition for Writ of Mandamus to the United States
District Court for the
Western District of Texas, Waco

June 9, 1997

Before JONES, DEMOSS and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

MOT-18

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ISABEL G. ANDRADE, et al.,	§	**Civil No. W-96-CA-139**
	§	**and consolidated with:**
Plaintiffs,	§	**W-96-CA-140**
	§	**W-96-CA-141**
v.	§	**W-96-CA-142**
	§	**W-96-CA-143**
PHILLIP J. CHOJNACKI, et al.	§	**W-96-CA-144**
	§	**W-96-CA-145**
Defendants.	§	**W-96-CA-146**
	§	**W-96-CA-147**

February 18, 1997

ORDER

This action arises out of the tragic events resulting from the failed raid by officers of the Bureau of Alcohol, Tobacco and Firearms ("ATF") on the Branch Davidian complex at Mt. Carmel ("Mt. Carmel") in the early spring of 1993. Plaintiffs consist of Branch Davidians who were injured in the initial raid or subsequent fire, or their surviving family members. Defendants are the United States and various governmental entities and employees involved in the initial raid, the subsequent standoff and final assault. Plaintiffs initiated the instant civil suits in the Southern District of Texas, Houston Division. Upon motion by Defendants, the cases were transferred to this Division. Plaintiffs have filed a number of pre-trial motions, including a motion to recuse the undersigned, who presided over the criminal trial of various Branch Davidians ("the criminal trial") and separate civil litigation brought by wounded agents of the ATF against various media organizations and representatives who were present at Mt. Carmel on the day of the raid ("the Risenhoover litigation").

Having reviewed Plaintiffs' motions and Defendants' responses, the following disposition will be made:

I. MOTION TO INTERVENE

Initially, the Court notes that Plaintiffs have filed motions to intervene in the Risenhoover litigation in order to discover information that was filed under seal as an exhibit to the media Defendants' motion to recuse. The undersigned has fully examined the pertinent sealed document and is persuaded that the information contained therein is unrelated to the present motion to recuse. The document at issue includes no statements or opinions regarding the Branch Davidians. Accordingly, Plaintiffs' Motion to Intervene in Risenhoover to Modify Protective Order; Motion to Compel Production of Discovery and Motion for Injunction is **DENIED**.[1] As no party has presented any reason why the pertinent document should remain sealed, it is **ORDERED** that the Clerk's Office attach as an exhibit to this Order, Exhibit 1 to the Cox Defendants' Sealed Motion for Relief, Memorandum of Interview dated June 13, 1995, which was filed in Civil Action No. W-93-CA-138 (consolidated). The remainder of the Cox Defendants' motion will remain sealed.

II. MOTIONS FOR DISCOVERY AND PROTECTION

The parties have filed numerous motions regarding discovery as it relates to the Risenhoover litigation. As the parties to that suit have settled, these motions are now moot. Accordingly, it is **ORDERED** that the Individual Federal Defendants' Motion for a Protective Order is **GRANTED** and the Plaintiffs' Motion for Discovery Before ATF Agents' Depositions Begin is **DENIED.**. The Court will, however, order the Government not to dispose of any documents or information produced during discovery in the Risenhoover litigation, and the current stay on discovery will remain in effect.

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[1] An identical motion was filed in the ATF litigation, Civil Action No. W-93-CA-138 styled John T. Risenhoover, et al. v. Cox Texas Publications, Inc., et al. It is likewise **DENIED.**

III. RECUSAL

Plaintiffs assert that recusal is appropriate in this case under 28 U.S.C. § § 144, 455(a) and 455(b)(1) for basically three reasons: (1) rulings and comments made during the criminal trial and related litigation demonstrate that the undersigned is biased and prejudiced against the Branch Davidians and Plaintiffs; (2) the undersigned's knowledge of local events and professional acquaintance with two Defendants create the appearance of bias; and (3) comments critical of the undersigned by groups and individuals sympathetic to the Branch Davidians "create reasonable questions about whether Plaintiffs' [sic] can get a fair trial before a judge so attacked by their supporters."[2] Plaintiffs' Motion to Transfer to San Antonio Division or, Alternatively, to Recuse Judge Walter S. Smith, Jr. ("Andrade Motion"), p. 30; Plaintiffs' Motion for Recusal and Transfer to San Antonio ("Brown Motion"). The facts upon which Plaintiffs rely consist of the following:

1. The undersigned has a "history of loyalty and service to the community and its institutions, government agencies and personnel," and has "worked extensively with many of the government officials who participated in various ways in events leading up to this tragedy, the tragedy itself and its aftermath. . . ." Brown Motion, pp. 4. and 5.

2. The appeal of the criminal convictions is pending. Brown Motion, p. 5; Andrade Motion, p. 27.

3. A ruling has already been made by the undersigned adverse to the Gyarfas plaintiffs. Brown Motion, p. 5.

4. The undersigned has never recognized that Plaintiffs were exercising their religion at Mt. Carmel, nor "shown anything but contempt, or worse, for the Church, its members, or its children," referring to the Mt. Carmel center as a "compound," and referring to its inhabitants as a "cult" and "Davidians." Brown Motion, pp. 5-6, 10.

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[2] Plaintiffs have additionally included some unsupported allegation that the undersigned was investigated by the Department of Justice on charges of perjury in an unrelated matter. As the undersigned has no knowledge of this investigation, it could not constitute the basis for any bias or prejudice.

5. At the sentencing of the related criminal defendants, the undersigned referred to events during the initial raid and subsequent fire in terms that exhibited more compassion for the four dead ATF agents than the deceased residents of Mt. Carmel. Brown Motion, p. 7.

6. Also at sentencing, the undersigned referred to several facts established during the trial, including the following: (a) except for a handful of individuals, the remaining Davidians committed suicide or were killed by other Davidians; (b) the religious ideology of the Branch Davidians included the belief that they would be involved in a violent conflict with federal agents and they stockpiled weapons and ammunition to prepare for this conflict; (c) the first shots on the day of the raid were fired from inside the Mt. Carmel complex. Brown Motion, pp. 7-8.

7. The undersigned reinstated the convictions of the criminal defendants on charges of using a firearm during the commission of a crime of violence after initially ruling that the convictions should be set aside as the defendants were acquitted of conspiring and aiding and abetting in the murder of federal agents. Brown Motion, p. 8.

8. In an opinion in the Risenhoover case, and in the criminal trial, the undersigned referred to incidents regarding the Branch Davidians before and during the raid, and concluded that the fire at Mt. Carmel was set by the Branch Davidians. Brown Motion, p. 9; Andrade Motion, p. 34.

9. The undersigned has "ties" to Defendants William Sessions and William Johnston. Andrade Motion, p. 14.

10. The undersigned was criticized by some members of the media and various authors and publications regarding rulings made during the criminal trial. Brown Motion, p. 6; Andrade Motion, pp. 29-30.

A motion for recusal is within the discretion of the trial judge, and will be reversed only if the judge has abused that discretion. United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987) (citations omitted). A motion for recusal falls within two types: (1) a motion alleging actual bias upon the part of a judge, which is filed under 28 U.S.C. § 144; and (2) a motion alleging the appearance of impropriety, which is filed under 28 U.S.C. § 455. A motion under § 144 must meet certain procedural

requirements, such as the following: (1) a party must file a "timely and sufficient affidavit" setting out the alleged personal bias or prejudice; and (2) the affidavit must be legally sufficient. 28 U.S.C. § 144; United States v. Miranne, 688 F.2d 980, 985 (5th Cir. 1982), cert. denied, 459 U.S. 1109 (1983) (citations omitted). Although the judge for whom recusal is sought may not pass upon the truth of the matters alleged in a § 144 affidavit, he must review them to determine whether they meet the standard of "legal sufficiency." Henderson v. Dept. of Public Safety & Corrections, 901 F.2d 1288 (5th Cir. 1990). To be "legally sufficient", the affidavit must meet the following test:

> (1) the facts must be material and stated with particularity; (2) the facts must be such that, if true, they would convince a reasonable person that bias exists; and (3) the facts must show that the bias is personal, rather than judicial, in nature.

Merkt, 794 F.2d at 960, n.9 (citations omitted); Henderson, 901 F.2d at 1296. See also Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc., 690 F.2d 1157, 1165 (5th Cir. 1982), cert. denied, 464 U.S. 814 (1983). If the affidavit meets the above criteria, then "the factual allegations must be taken as true for purposes of recusal." Merkt, 794 F.2d at 960.

Under the provisions of § 455(a), a judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." A judge shall also disqualify himself under certain circumstances enumerated under § 455(b), including "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Henderson, 901 F.2d at 1295. The courts have noted that the purpose of § 455(a) is "to avoid even the appearance of partiality." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 861 (1988), quoting the lower Court opinion at 796 F.2d 796, 802 (5th Cir. 1986).

> If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. . . . Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts

> indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.

Id. If a judge concludes that "'his impartiality might reasonably be questioned,' then he should also find that the statute has been violated." Id.

Under either § 144 or § 455, the movant must establish that any claimed bias arises from an "extra-judicial" source, and must "result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Phillips, 664 F.2d 971, 1002 (5th Cir. Unit B 1981), cert. denied sub nom., Meinster v. United States, 457 U.S. 1136 (1982), quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). "Thus, a motion for recusal may not ordinarily be predicated upon the judge's rulings in the same or a related case." Id. at 1002-1003. The mere fact that a judge has ruled adversely to a litigant is insufficient to support a claim of recusal. United States v. Schoenhoff, 919 F.2d 936 (5th Cir. 1990).

A judge must also be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of an anticipated adverse decision. In re Kansas Public Employees Retirement System, 85 F.3d 1353, 1358-59 (8th Cir. 1996), citing Legislative history to § 455, S.Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973).

> Disqualification for lack of impartiality must have a reasonable basis. Nothing in [§ 455(a)] should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Id. See also United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992). The allegations and innuendoes raised by Plaintiffs in this case persuade the undersigned that Plaintiffs' request for recusal actually is an attempt to avoid a ruling on Defendants' motions to dismiss and for summary judgment because motions raising similar issues were, for the most part, decided counter to Plaintiffs' interests by the undersigned in the companion case of Gyarfas v. United States, et al., Civil Action No. W-95-CA-022. Even if this is not true, the allegations raised by Plaintiffs in the instant action are insufficient to justify recusal under 144, 455 (a) or 455 (b).

A. Comments and Prior Court Rulings. The great majority of Plaintiffs' allegations of "bias" and "prejudice" arise from statements and rulings made by the undersigned in the criminal trial and in the Risenhoover litigation. The courts have repeatedly held that information obtained during the course of litigation cannot, generally, be a basis for recusal. See United States v. Mizell, 88 F.3d 288 (5th Cir.), cert. denied, ____ U.S. ____, 117 S. Ct. 620 (1996).

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were property and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." In re J.P. Linahan, Inc., 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147, 1155 (1994). Opinions formed on the basis of facts introduced or events occurring during the course of a proceeding, or a prior proceeding, may, however, constitute a basis for recusal if "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Id. at 1157. The comments identified by Plaintiffs in this case were based upon the undisputed testimony introduced at the criminal trial and in the summary judgment exhibits in the Risenhoover case. In neither case was there a concerted effort made to contest the facts which now concern Plaintiffs; namely, that the Branch Davidians fired first, that the Branch Davidians started the fire that consumed Mt. Carmel, and that the teachings of David Koresh were "para-military" in nature. The defendants in the criminal trial did not testify and did not, therefore, present actual "evidence" to support the assertions raised solely by their attorneys and widely reported in the media as "fact." Additionally, the statements Plaintiffs contest from the Risenhoover case were based upon the pleadings, the uncontroverted summary judgment proof, and the Waco Tribune-Herald's series The Sinful

Messiah, which was included as an exhibit. There is, therefore, no "actual" bias or prejudice identified, nor is there anything presented which could lead a reasonable person in full possession of the pertinent facts to conclude that any bias or prejudice is present merely from the comments and rulings identified by Plaintiffs. Clearly, if the issues raised by Plaintiffs in this case are supported by evidence that was not introduced at either the criminal trial or in the Risenhoover case, it will be weighed and evaluated as any other evidence.

B. Pending Appeal. Plaintiffs next argue that the pending appeal in the criminal case warrants recusal due to the possibility of the undersigned being reversed by the Fifth Circuit Court of Appeals. As previously noted, the courts have held that it is "normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." Liteky, 114 S. Ct. at 1155. Therefore, the specter of reversal does not, in itself, justify recusal. To allay Plaintiffs' fears, it should be noted that the Fifth Circuit has affirmed the convictions of the criminal defendants in United States v. Brad Eugene Branch, et al., 91 F.3d 699 (5th Cir. 1996). Mandate was held pending en banc review of the constitutionality of 28 U.S.C. § 922(o) in a separate case, as it related to the convictions of Paul Fatta on two counts. However, the Fifth Circuit has now upheld the constitutionality of that statute. See United States v. Kirk, ____ F.3d ____, 1997 WL 40602 (5th Cir., Feb. 3, 1997) (en banc). The defendants' sentences on Count Three (using or possessing a firearm during the commission of a violent felony), however, were remanded for reconsideration in light of the opinion in Bailey v. United States, ____ U.S. ___, 116 S. Ct. 501 (1995). Therefore, except for this one issue, which is only tangentially related to the issues in the present case, the undersigned's rulings and findings in the criminal case were upheld. Accordingly, there is no basis for recusal because of the pending appeal.

C. Acquaintance with Defendants Sessions and Johnston. Generally, a friendship between a presiding judge and a person with an interest in a case is, in and of itself, insufficient to justify recusal. See United States v. Jordan, 49 F.3d 152 (5th Cir. 1995); Vieux Carre Property Owners v. Brown, 948 F.2d 1436 (5th Cir. 1991); Henderson v. Dept. of Public Safety, 901 F.2d 1288 (5th Cir. 1990). Plaintiffs believe recusal is justified because of the undersigned's "relationship" with two Defendants: (1) William Sessions ("Sessions"), who was director of the Federal Bureau of Investigation ("FBI") during the events at issue; and (2) Assistant United States

[*text apparently missing from original order as received and filed with district court*]

The only allegation regarding a relationship with Johnston is that he appears regularly before the undersigned. There apparently is no case law that mandates recusal in such a situation. The relationship with Sessions is not any closer. While the undersigned and Sessions worked for the same firm, it was at different times. The undersigned worked for the Haley, Fulbright firm from 1978-1980. By 1978, Sessions had been appointed to serve as a United States District Judge in the El Paso Division. Prior to his appointment to the federal bench in 1974, the Texas Legal Directory reflects that Sessions served as the United States Attorney for the Western District of Texas in San Antonio from 1971-74. Prior to that, he was employed with the Department of Justice in Washington, D.C. from 1969 to 1971. Sessions served as Chief Judge of the Western District of Texas in San Antonio from 1980 until his appointment as Director of the FBI in 1987. The undersigned became a colleague of Sessions' only after appointment as a United States Magistrate in the Waco Division in 1983, and appointment as the United States District Judge for the Waco Division in 1984. The mere fact that a judge was a colleague of an individual with an interest in a case before him does not form a basis for recusal. See United States v. Harrelson, 754 F.2d 1153 (5th Cir. 1985), cert. denied, 474 U.S. 908 and cert. denied, 474 U.S. 1034 (1985) (recusal not required even though presiding judge had been a colleague of assassinated judge for eight to nine years, was an honorary pallbearer at the funeral, eulogized him at memorial ceremonies, and was placed under 24-hour guard for over a year after assassination, as there was no special social relationship between the judges or their families). A similar past relationship was held not sufficient to justify recusal in United States v. Lovaglia, 954 F.2d 811 (2d Cir. 1992). In that case the presiding judge's former law firm represented a victim of the criminal activity of a defendant appearing before the judge. The judge had also been involved in a business and social relationship with a shareholder in one of the victim construction companies. However, there had been no business or social relationship between with this individual in seven to eight years. See also Vieux Carre Property Owners v. Brown, 948 F.2d 1436 (5th Cir. 1991); Henderson v. Dept. of Public Safety & Corrections, 901 F.2d 1288 (5th Cir. 1990).

The situation in United States v. Jordan, 49 F.3d 152 (5th Cir. 1995) is far different from the circumstances of this case. In Jordan, a panel of the Fifth Circuit determined that recusal was required under § 455(a) because the judge

was a close personal friend of an individual who had been accused of criminal misconduct by the defendant appearing before her. Additionally, the judge's husband had been law partners with the individual for six years and represented the individual in the criminal case brought by the defendant. Finally, the judge and her husband were law school classmates with the individual and his wife, and had been close friends for 22 years. Obviously, this is a far cry from the limited relationship identified by Plaintiffs. As the Fifth Circuit has noted:

> In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend --even a close friend -- [is involved].

Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1411 n. 13 (5th Cir. 1994), citing United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986). Accordingly, recusal is not warranted based upon any relationship between the undersigned and either Johnston or Sessions.

D. Criticism by Supporters and the Media. Plaintiffs finally argue that a number of Branch Davidian supporters and authors have criticized the undersigned for various rulings and the conduct of the criminal trial. In a free society, public comment is, of course, to be unfettered and unrestrained. However, we cannot allow negative criticism to hamstring the operations of the judiciary. If that were so, recusal would be mandated in every high profile case, where there may be as many opinions as spectators. Accordingly, Plaintiffs' allegations in this regard are also insufficient to justify recusal. In light of the foregoing, it is **ORDERED** that the Motions to Recuse filed by the Plaintiffs are **DENIED.**

IV. MOTIONS TO TRANSFER VENUE

Plaintiffs alternatively argue that even if recusal is not forthcoming, the trial of this case should be held in some division other than Waco, preferably in San Antonio. The undersigned is persuaded that these motions are premature. When the case is closer to trial, Plaintiffs may then renew their motions. Accordingly, Plaintiffs' Motions to Transfer Venue to San Antonio are **DENIED.**

V. OTHER PENDING MOTIONS

Defendants have filed motions to dismiss and motions for summary judgment. In order to expeditiously resolve these motions, it is **ORDERED** that any additional briefing or summary judgment proof shall be submitted to the Court by March 3, 1997. No additional briefs or exhibits will be considered, except in the most extraordinary circumstances and only with leave of Court. As to the remaining motions, it is

ORDERED that the following motions are **GRANTED**: (1) Plaintiffs' Motion for Leave to File a Sur-reply, filed on April 12, 1996; (2) Motion by the United States to File a Memorandum of Law Which Exceeds the Page Limit in Support of its Motion to Dismiss and for Summary Judgment, filed on April 15, 1996; (3) Motion by Robert Rodriguez to Join Individual Federal Defendants' Motion for a Protective Order, filed on May 30, 1996; (4) Motion by Holub Plaintiffs for Leave to File a Response to the United States' Motion to Dismiss and for Summary Judgment Which Exceeds the Page Limit, filed on May 30, 1996; (5) Motion by Plaintiffs for Leave of Court to Supplement the Record With Corrected Exhibit Numbers and Incorporated Memorandum in Response to the United States' Motions to Dismiss and for Summary Judgment, filed on June 3, 1996; and (6) Motion by Plaintiffs to Clarify Plaintiffs' Motion to Transfer to San Antonio Division or, Alternatively, to Recuse, filed on June 5, 1996. It is further

ORDERED that the Motion of the United States to Strike the Declaration of Brad Branch or, in the Alternative, for Leave to File an Additional Memorandum of Law, filed on April 25, 1996, and Supplement to the Motion filed on April 26, 1996, are partially **GRANTED** in that the United States is granted leave to file an additional memorandum of law. It is further

ORDERED that Defendants' Objection to Plaintiffs' Filing of Extraneous Pleadings or, in the Alternative, Motion for Leave to Respond, filed on December 24, 1996, is partially **GRANTED** in that the United States is granted leave to file a response. It is further

ORDERED that Defendants' Motion for Enlargement of Time to Respond to Plaintiffs' Motions to Transfer or, Alternatively, to Recuse, filed on June 7, 1996 is **DENIED** as moot, as the Court has considered their response filed on June 28, 1996. It is further

ORDERED that Plaintiffs' Motion for Reconsideration of Defendants' Motion for Leave to File Supplemental Briefs, filed on August 30, 1996 is **DENIED.** It is further

ORDERED that Plaintiffs' Unopposed Motion for Enlargement to Respond to the United States' Motion for Leave to Exceed Page Limit and to Preserve Issues for Later Briefing and Argument (filed in W-96-CA-139 and W-96-CA-373) is **GRANTED** and Plaintiff s shall file their response on or before February 20, 1997. Plaintiffs' Agreed Motion to Extend Deadline, filed on January 14, 1997, and Unopposed Motion for Enlargement of Time, filed on January 22, 1997, are **DENIED** as moot. It is further

ORDERED that Defendants' Unopposed Motion for Enlargement of Time filed on January 21, 1997 is **GRANTED** and Defendants shall have until February 20, 1997 to file their response to Plaintiffs' motion for leave to file supplemental briefs and amended motion for leave to amend their consolidated complaint.

SIGNED this 18th day of February, 1997.

/s/ **WALTER S. SMITH, JR.**
United States District Judge

EXHIBIT 1 to APPENDIX C

WACO ADMINISTRATIVE REVIEW

MEMORANDUM OF INTERVIEW Date: June 13, 1995

FILE TITLE: ISMITHW.HGM WITNESS: WALTER S. SMITH TITLE: JUDGE DATE OF INTERVIEW: JUNE 30, 1993 INTERVIEWER: H. GEOFFREY MOULTON, JR.	THIS REPORT IS THE PROPERTY OF THE DEPARTMENT OF THE TREASURY, WACO ADMINISTRATIVE REVIEW. NEITHER IT NOR ITS CONTENTS MAY BE DISSEMINATED OUTSIDE THE TREASURY DEPARTMENT

Witness: Judge Walter S. Smith, Jr.

Date of interview or action: June 30, 1993

Report prepared by: H. GEOFFREY MOULTON, JR.

Contact Address: United States District, Waco, Texas

Contact phone number:

1. On Wednesday, 06/30/93, I spoke by telephone with Judge Walter S. Smith, Jr., United States District Judge in Waco, Texas. Smith was returning my call of the day before. When I asked Judge Smith about setting up an interview in Waco, he responded that he could tell me in five minutes, over the telephone, all he knew about the raid on the Davidian Compound before its execution. Because Judge Smith clearly preferred to be interviewed at the time on the telephone, I proceeded with the interview.

2. Judge Smith stated that he first learned about ATF's plan to serve the warrants in question on Friday, 02/26/93, at about 3:00PM. At that time AUSA John Phinizy, who had been in Smith's courtroom for another purpose, asked to come to chambers to speak with the Judge. Phinizy explained that AUSA Bill Johnston had asked him to tell the Judge, for security reasons, that ATF planned to serve search and arrest warrants at the compound on Sunday morning. Phinizy stated that the Waco Tribune-Herald was planning to write a story about Koresh and the Branch

Davidian, that ATF had therefore contacted the paper and asked it to delay publication until after the raid, and that the paper had been holding off. Phinizy then said that at the last minute the paper had said it was going to publish the story on Sunday. Phinizy explained that ATF planned to go out Sunday morning, buy up the newspapers and try to execute the warrants anyway.

3. On Saturday morning, 02/27/93, AUSA Bill Johnston called Judge Smith to express his frustration over the fact that the Tribune-Herald had published the first installment of their "Sinful Messiah" series that morning. Johnston said he did not know whether the action would go forward, and told the Judge there would be a meeting late on Saturday to decide. Judge Smith told me that he spoke with no one other than Phinizy and Johnston about the raid until the afternoon of 02/28/93.

4. At about 12:30PM on 02/28/93, Judge Smith was having Sunday dinner at home with his brother. After his brother expressed concern about something he had seen in the Tribune-Herald (unrelated to Koresh et al.), Judge Smith said "if you think that's bad," and proceeded to relate the essence of what he had heard from AUSAs Phinizy and Johnston. Judge Smith continued by saying to his brother that he hoped no one was injured, and that if there were injuries he would lay responsibility at the door of the newspaper. Five minutes later, Judge Smith received a phone call from a friend who said he should turn on the TV. When he did so, Judge Smith saw that the raid had gone forward and gone bad.

5. Judge Smith stated that he had no other pre-raid knowledge either about the raid or about how the media and Koresh learned of the raid.

CONFIDENTIAL
Subject to Protective Order
Risenhoover v. Cox Texas Pub.
USDC WD Tex. W-93-CA-138

APPENDIX D

EXCERPTS FROM SENTENCING FINDINGS AND OPINION
United States v. Branch

June 17, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No. W-93-CR-046
	§	
BRAD EUGENE BRANCH (2),	§	
KEVIN WHITECLIFF (3),	§	
CLIVE DOYLE (4),	§	
JAMIE CASTILLO (5),	§	
LIVINGSTON FAGAN (6),	§	
PAUL GORDON FATTA (7),	§	
GRAEME LEONARD CRADDOCK (10)	§	
RENOS AVRAAM (11), and	§	
RUTH OTTMAN RIDDLE (12),	§	
Defendants.	§	

SENTENCING FINDINGS AND OPINION

Pages 1-3:

On February 28, 1993, an American tragedy of epic proportions took place near the community of Elk in Central Texas. The following sets forth the Court's findings, made by a preponderance of the evidence.

On, before, and after February 28, serious mistakes were made. Defense arguments at trial were that serious mistakes in judgment, particularly whether to proceed with execution of the search warrant after the element of surprise had been lost, were made by some in leadership roles of the Bureau of Alcohol,

Tobacco and Firearms. Those allegations are not before this Court in this case, and are not deemed relevant in determining issues now before the Court.

The mistakes made by the Defendants now before the Court, and their co-conspirators, however, were serious violations of federal criminal law, and resulted in the homicide of four young agents, the injury of numerous other agents, and the deaths of numerous residents of the building referred to during the trial as the "Compound."

These Defendants, and other adult Branch Davidians, engaged in a conspiracy to cause the deaths of federal agents. It was a part of the beliefs of the Branch Davidians, expressed and taught by their leader, that they must bring about a violent conflict with federal agents, thereby forcing the agents to use deadly force against them, and by dying in the ensuing battle to be "translated" immediately to Heaven.

To this end, immense preparations were made. Huge sums were fraudulently charged to many credit cards in order to acquire an armory that would rival that of a National Guard unit's; ammunition in an unbelievable quantity was acquired; para-military uniforms and gear were purchased and created by Davidian seamstresses; firearm training and fortification of the Compound took place; the leader preached sermons to motivate his "army"; and finally preparations for the ambush of February 28 were completed.

At about 9:00 a.m. on that fateful morning, as agents attempted to execute a lawful search warrant, the first shots were fired from inside the front door of the Compound, wounding Agent Ballesteros in his hand. Immediately thereafter, countless shots were fired from many locations in different areas of the Compound, and a gun battle lasting approximately two and one-half hours ensued.

Thereafter, for 51 days these Defendants and their co-conspirators defied federal authority and refused to surrender. Finally, by a combination of suicide and murder inflicted by Davidian upon Davidian, all but a handful of the Davidians were killed.

* * * *

Page 6, excerpt:

Such reasoning would clearly be applicable to the facts in this case. The evidence established the existence of not only a figurative but a literal fortress, manned by each of the Defendants convicted on this count. Each either had actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28, 1993 and through the 51 day siege.

* * * *

SIGNED this 17th day of June, 1994.

/s/ WALTER S. SMITH, JR.
United States District Judge

APPENDIX E

EXCERPTS FROM THE SENTENCING HEARING

June 16-17, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal Action No.
	§	W-93-CR-046 (2) (3)
BRAD EUGENE BRANCH,	§	(4) (5) (6) (7) (8) (9)
KEVIN A. WHITECLIFF,	§	(10) (11) & (12)
JAMIE CASTILLO,	§	
LIVINGSTON FAGAN,	§	
PAUL GORDON FATTA,	§	
GRAEME LEONARD CRADDOCK,	§	June 16-17, 1994
RENOS AVRAAM and	§	
RUTH OTTMAN RIDDLE	§	San Antonio, Texas

BEFORE THE HONORABLE WALTER S. SMITH, JR., JUDGE PRESIDING

SENTENCING

* * * * *

Sentencing Hearing Transcript, page 188, line 19 through page 189, line 1:

THE COURT: Before calling on Mr. Jahn for the Government, let me comment, Mr. Turner [*counsel for one of the Branch defendants**], that you need not be embarrassed. Were it not for the extremely excellent representation that these Defendants received from you and all of the other attorneys involved, they would, in all likelihood, in my experience be facing sentences of automatic life in prison, having been convicted of the Conspiracy charge in Count One.

* Petitioners have added this identification to this reproduction of the transcript.

* * * * *

Hearing Transcript, page 220, lines 4 - 12:

[*The Court**]

The evidence from this trial has not faded from my memory. Certain images are clear. I see Livingston Fagan dressed in combat gear, coldly shooting down Eric Evers with a military rifle as he first rounded the corner of the Compound and came into view. As Evers tried to get up, Fagan shot him twice more. Agent Evers finally managed to get himself into the pit and was pinned down there bleeding for nearly three hours. Once, he - - when he tried to extricate himself, he felt a round on his helmet.

* * * * *

Hearing Transcript, page 220, line 20 through page 221, line 6:

[*The Court**]

I remember evidence that the jury didn't see, evidence that I ruled was too gruesome under the Rules of Evidence, photographs of Conway Lebleu, Todd McKeehan and Robert Williams and Steven Willis before they had the benefit of the mortician's art.

I also have, as part of the Pre-Sentence Reports, statements from the survivors of those agents, expressing the depths and the losses they suffered, the widows, children, parents and other family members. And I note that not one single Defendant, although Graeme Craddock and Ruth Riddle came close, apologized to those victims or expressed any real sorrow for the dead and injured agents.

* * * * *

* Petitioners have added this identification to this reproduction of the transcript.

APPENDIX F

EXCERPTS FROM COURT'S INSTRUCTIONS TO THE JURY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No. W-93-CR-046
	§	
BRAD EUGENE BRANCH (2)	§	
KEVIN WHITECLIFF (3)	§	
CLIVE DOYLE (4)	§	
JAIME CASTILLO (5)	§	
LIVINGSTONE FAGAN (6)	§	
PAUL GORDON FATTA (7)	§	
WOODROW KENDRICK, a/k/a	§	
BOB KENDRICK (8)	§	
NORMAN WASHINGTON ALLISON,	§	
a/k/a DELROY NASH (9)	§	
GRAEME LEONARD CRADDOCK (10)	§	
RENOS AVRAAM (11)	§	
RUTH OTTMAN RIDDLE (12)	§	

COURT'S INSTRUCTIONS TO THE JURY

* * * * *

COUNT ONE

Count One of the Indictment charges that from on or before February 1992, and continuing thereafter up to and including April 19, 1993, in the Western District of Texas, Defendants, Brad Eugene Branch, Kevin A. Whitecliff, Clive J. Doyle, Jaime Castillo, Livingstone Fagan, Paul Gordon Fatta, Woodrow Kendrick, also known as Bob Kendrick, Norman Washington Allison, also

known as Delroy Nash, Graeme Leonard Craddock, Renos Avraam and Ruth Ottman Riddle did knowingly, willfully and unlawfully combine, conspire, confederate and agree together and with each other, and with persons known and unknown to the Grand Jury, to kill, with malice aforethought during the performance and on account of the performance of their duties, officers and employees of the Bureau of Alcohol, Tobacco and Firearms (hereinafter "ATF"), United States Department of the Treasury, including but not limited to, ATF Special Agents Seven D. Willis, Robert Williams, Conway C. LeBleu, and Todd W. McKeehan, and Agents of the Federal Bureau of Investigation (hereinafter "FBI"), United States Department of Justice, all agencies of the United States as specified in Title 18, United States Code, Section 1114, all in violation of Title 18, United States Code, Section 1117.

MEMBERS OF THE CONSPIRACY

With regard to the members of the alleged conspiracy, Count One of the Indictment alleges that at all times pertinent to this indictment, Vernon K. Howell, also known as David Koresh, was a member of and the self-proclaimed prophet of a group of individuals who lived at a location known as Mount Carmel, located near Waco, Texas. Steven Emil Schneider and Douglas Wayne Martin were followers of and advisors to Vernon Howell, also known as David Koresh. The Defendants, Brad Eugene Branch, Kevin A. Whitecliff, Clive J. Doyle, Jaime Castillo, Livingstone Fagan, Paul Gordon Fatta, Woodrow Kendrick, also known as Bob Kendrick, Norman Washington Allison, also known as Delroy Nash, Graeme Leonard Craddock, Renos Avraam, Ruth Ottman Riddle, and others were followers of Vernon K. Howell, also known as David Koresh.

SCOPE AND NATURE OF THE CONSPIRACY

What follows on pages 19-22 are the verbatim allegations from the indictment:

It was a part of the conspiracy that Vernon K. Howell, also known as David Koresh, would and did advocate and encourage an armed confrontation, which he described as a "war," between his followers and representatives of the United States government. Vernon K. Howell, also known as David Koresh, originally predicted that this "war" would occur in the Nation of Israel and later changed the location to Mount Carmel, near Waco, Texas.

It was a part of the conspiracy that in order to prepare for the "war" with the United States, Vernon K. Howell, also known as David Koresh, would and did establish a unit among his followers which he called the "Mighty Men." Defendants, Brad Eugene Branch, Kevin A. Whitecliff, Clive J. Doyle, Jaime Castillo, Livingstone Fagan, Paul Gordon Fatta, Woodrow Kendrick, also known as Bob Kendrick, Norman Washington Allison, also known as Delroy Nash, Graeme Leonard Craddock, Renos Avraam, and other followers were members of the "Mighty Men."

It was a part of the conspiracy that in order to arm his followers for the "war" with the United States, Vernon K. Howell, also known as David Koresh, would and did direct that a business location called "The Mag Bag" be established near Mount Carmel for the purpose, among others, of receiving shipments of paramilitary supplies. The supplies purchased and received at The Mag Bar [sic] included: firearms part (including parts for fully automatic AK-47 and M-16 rifles); thirty (30) round magazines and one hundred (100) round magazines for M-16 and AK-47 rifles; pouches to carry large ammunition magazines, substantial quantities of ammunition of various sizes (including .50 caliber armor piercing ammunition); grenade launcher parts, flare launchers, K-bar fighting knives, night vision equipment, hand grenade hulls, kevlar helmets, bullet proof vests and other similar equipment.

It was a part of the conspiracy that Defendants Brad Eugene Branch and Paul Gordon Fatta would and did make the necessary arrangements to obtain The Mag Bag location, which had a mailing address of Route 7, Box 555, Waco, Texas. It was further a part of the conspiracy that Defendant Paul Gordon Fatta would and did acquire a Texas Sales and Use Tax Permit in the name of "The Mag Bag." It was a part of the conspiracy that Defendants Woodrow Kendrick, also known as Bob Kendrick, and Norman Allison, also known as Delroy Nash, would and did occupy the premises for the purpose (among others) of receiving paramilitary supplies.

It was a part of the conspiracy that Defendants Brad Eugene Branch, Jaime Castillo, Paul Gordon Fatta and Woodrow Kendrick, also known as Bob Kendrick, and others would and did acquire and assist in the acquisition of weapons to be used in the "war" with the United States, including .50 caliber semi-automatic rifles.

It was a part of the conspiracy that Defendant Paul Gordon Fatta and others, would and did assist in converting legally purchased semi-automatic rifles to

fully automatic rifles. It was a part of the conspiracy that inert hand grenade shells would be converted to live hand grenades for the purpose of waging "war" against the United States government.

It was a part of the conspiracy that on February 28, 1993, after becoming aware of a planned search of the premises of Mount Camel by agents of the ATF, Vernon K. Howell, also known as David Koresh, would and did instruct his followers to prepare for the arrival of the federal agents. It was a part of the conspiracy that Brad Eugene Branch, Kevin A. Whitecliff, Clive J. Doyle, Jaime Castillo, Livingstone Fagan, Graeme Leonard Craddock, Renos Avraam, Ruth Ottman Riddle, and others should and did change into camouflage/combat clothing and equipment, gather their pistols and rifles, load magazines, distribute hand grenades, assume ambush positions and engage in other conduct designed to kill and attempt to kill and aid and abet the killing of Agents of the ATF upon their arrival at Mount Carmel.

It was a part of the conspiracy that on February 28, 1993, after the ambush of ATF agents at Mount Carmel by their other conspirators, Defendants, Norman Allison, also known as Delroy Nash, and Woodrow Kendrick, also known as Bob Kendrick, and another person would arm themselves at The Mag Bag and endeavor to forcibly enter Mount Carmel to assist the other conspirators.

It was a part of the conspiracy that after the initial ambush of the ATF, Defendants, Brad Eugene Branch, Kevin A. Whitecliff, Clive J. Doyle, Jaime Castillo, Livingstone Fagan, Graeme Leonard Craddock, Renos Avraam, Ruth Ottman Riddle, and others would and did forcibly resist and oppose agents of the FBI who were authorized to execute search warrants under the authority of the United States from February 28, 1993, until each of them emerged from Mount Carmel.

It was a part of the conspiracy that on April 18, 1993, Vernon K. Howell, also known as David Koresh, and Steven Schneider would and did finalize a plan to burn Mount Carmel in the event an effort was made to finally end the siege by the FBI. The plan was communicated to other residents of Mount Carmel.

It was a part of the conspiracy that on April 19, 1993, some of the conspirators would and did fire upon tanks and other vehicles manned by FBI agents in an attempt to drive them back from Mount Carmel.

It was a part of the conspiracy that on April 19, 1993, Vernon K. Howell also known as David Koresh, would give instructions to spread flammable fuel within Mount Carmel upon learning that the FBI was to introduce tear gas into Mount Carmel to end the siege. It was a part of the conspiracy that an unidentified conspirator would and did give instructions at about noon on April 19, 1993, to start the fires within Mount Carmel.

Remember that all of pages 19-22 are allegations made in the indictment, and are not findings I have made.

OVERT ACTS

Count One of the Indictment alleges that the Defendants and their conspirators, known and unknown, committed the following overt acts in furtherance of such agreement and conspiracy:

1. On August 4, 1992, in the Western District of Texas, Vernon K. Howell, also known as David Koresh, executed documentation covering the purchase of 88 lower receivers for the AR-15 rifle, 16 handguns, and 10 rifles from Hewitt Handguns.

2. On February 28, 1993, in the Western District of Texas, Special Agent Steven D. Willis of the Alcohol, Tobacco and Fire was shot and killed by conspirators while he was attempting to execute search and arrest warrants.

3. On February 28, 1993, in the Western District of Texas, Special Agent Robert Williams of the Alcohol, Tobacco and Firearms was shot and killed by conspirators while he was attempting to execute search and arrest warrants.

4. On February 28, 1993, in the Western District of Texas, Special Agent Conway C. LeBleu of the Alcohol, Tobacco and Firearms was shot and killed by conspirators while he was attempting to execute search and arrest warrants.

5. On February 28, 1993, in the Western District of Texas, Special Agent Todd W. McKeehan of the Bureau of the Alcohol, Tobacco and Firearms was shot and killed by conspirators while he was attempting to execute search and arrest warrants.

6. On April 19, 1993, in the Western District of Texas, Agents of the Federal Bureau of Investigation were fired upon by conspirators as they endeavored to serve arrest and search warrants.

All in violation of Title 18, United States Code, Section 1117.

ELEMENTS OF COUNT ONE

Title 18, United States Code, Section 1117 makes it a crime for two or more persons to conspire to murder federal officers.

For you to find any Defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt as to that Defendant:

First: That two or more persons made an agreement to commit the crime of murder of federal agents as charged in the Indictment;

Second: That the Defendant under consideration knew the unlawful purpose of the agreement and joined it willfully, that is, with the intent to further the unlawful purpose;

Third: That at least one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described on pages ___ of these Instructions, in order to accomplish some object or purpose of the conspiracy; and

Fourth: That the Defendant under consideration conspired to kill federal agents with the requisite intent of malice aforethought, as defined on page _____ of these Instructions.

CONSPIRACY

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which every member becomes the agent of every other member.

One may become a member of a conspiracy without knowing all of the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him or her for conspiracy even though that defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, or that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

You must determine whether the conspiracy charged in the Indictment existed, and, if it did, whether the Defendant under consideration was a member of it. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict as to that count of the Indictment, even though you find that some other conspiracy existed. If you find that the Defendant under consideration was not a member of the conspiracy charged in the Indictment, then you must find that Defendant not guilty even though that Defendant may have been a member of some other conspiracy.

In your consideration of the conspiracy offense as alleged in the indictment you should first determine, from all of the testimony and evidence in the case, whether or not the conspiracy existed as charged. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not each Defendant willfully became a member of such conspiracy.

In determining whether a defendant was a member of an alleged conspiracy, however, the jury should consider only that evidence, if any, pertaining to his or her own acts and statements. He or she is not responsible for the acts or declarations of other alleged participants until it is established beyond a reasonable doubt, first that a conspiracy existed; and second, from evidence of his or her own acts and statements, that the defendant was one of its members.

On the other hand, if and when it does appear beyond a reasonable doubt from the evidence in the case that a conspiracy did exist as charged, and that the defendant under consideration was one of its members, then the statements and acts knowingly made and done during such conspiracy and in furtherance of its objects, by any other proven member of the conspiracy, may be considered by the jury as evidence against that defendant even though he or she was not present to hear the statements made or see the acts done.

This is true because, as stated earlier, a conspiracy is a kind of "partnership" so that under the law each member is an agent or partner of every other member, and each member is bound by or responsible for the acts and statements of every other member made in pursuance of their scheme.

An "overt act" is any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

You must be unanimous in your decision of which overt acts, if any, were committed. In other words, it would not be a unanimous verdict if some of you believed one overt act was committed while others of you believed a different overt act had been committed. Additionally, the government must prove beyond a reasonable doubt that at least one of these alleged overt acts was committed in order to accomplish some object or purpose of the conspiracy by at least one member of conspiracy.

A conspirator is responsible for offenses committed by other conspirators if the conspirator was a member of the conspiracy when the offense was

committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy.

Therefore, if you have first found a Defendant guilty of the conspiracy charged in Count One, and if you find beyond a reasonable doubt that during the time the Defendant was a member of that conspiracy, other conspirators committed the offenses in Counts Two, Three, and/or Four in furtherance of or as a foreseeable consequence of that conspiracy, then you may find the Defendant guilty of Counts Two, Three, and/or Four, even though the Defendant may not have participated in any of the acts which constitute the offenses described in Counts Two, Three, and Four. The reason for this is that a conspirator committing a substantive offense pursuant to a conspiracy is held to be the agent of the other conspirators.

COUNT TWO

Count Two of the Indictment charges that on or about February 28, 1993, in the Western District of Texas, Defendants, Brad Eugene Branch, Kevin A. Whitecliff, Clive J. Doyle, Jaime Castillo, Livingstone Fagan, Paul Gordon Fatta, Woodrow Kendrick, also known as Bob Kendrick, Norman Washington Allison, also known as Delroy Nash, Graeme Leonard Craddock, Renos Avraam and Ruth Ottman Riddle by aiding and abetting unknown principals and each other did knowingly, willfully and unlawfully kill, with malice and aforethought, ATF Special Agents Steven D. Willis, Robert Williams, Conway C. LeBleu, and Todd W. McKeehan, Special Agents of the Bureau of Alcohol, Tobacco and Firearms, while said agents were engaged in the performance of their official duties, by shooting the said Agents with a firearm, in violation of Title 18, United States Code, Sections 1114, 1111(a), and Title 18, United States Code, Section 2.

ELEMENTS OF COUNT TWO

Title 18, United States Code, Section 1111, makes it a crime for anyone to murder another human being. Title 18, United States Code, Section 1114, makes it a crime to kill a federal official, including an Agent of the Bureau of Alcohol, Tobacco and Firearms, in the performance of his official duties.

For you to find any Defendant guilty of murder of a federal agent, you must be convinced that the government has proved each of the following elements beyond a reasonable doubt as to that Defendant:

First: That the Defendant under consideration aided and abetted the killing of ATF Special Agents Steven D. Willis, Robert Williams, Conway C. LeBleu and Todd W. McKeehan without lawful justification;

Second: That the persons killed were federal officers as described below, who were then engaged in the performance of their official duty, as charged;

Third: That the Defendant under consideration aided and abetted the killing of ATF Special Agents Steven D. Willis, Robert Williams, Conway C. LeBleu and Todd W. McKeehan with malice aforethought; and

Fourth: That the Defendant under consideration did not act in self-defense.

MALICE AFORETHOUGHT

"To kill with malice aforethought" (or "attempt to kill with malice aforethought" as is applicable in Court Four) means either to kill (or attempt to kill under Count Four) another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the Defendant under consideration hated the persons killed (or attempted to be killed under Count Four), or felt ill will toward the victim at the time.

In determining whether the killing (or attempted killing under Count Four) was with malice aforethought, you may consider the use of a weapon or instrument and the manner in which death was caused (or attempted under Count Four).

You should consider all the facts and circumstances preceding, surrounding, and following the killing (or attempted killing under Count Four) which tend to shed light upon the condition of mind of each Defendant, before and at the time of the killing (or attempted killing under Count Four). No fact, no matter how small, no circumstance, no matter how trivial, which bears upon the questions of malice aforethought should escape your careful consideration.

SCOPE OF EMPLOYMENT

You are instructed that an Agent of the Bureau of Alcohol, Tobacco and Firearms is one of the federal officers referred to in this law, and that it is part of the official duty of such an officer to execute search and arrest warrants issued by a Judge or Magistrate Judge of this Court. To find a Defendant guilty of this offense, you must determine that the government has proved beyond a reasonable doubt that ATF Special Agents Steven D. Willis, Robert Williams, Conway C. LeBleu and Todd W. McKeehan (or Special Agent Charles Meyer under Count Four) were acting within the scope of their official duties as agents of the ATF. You are further instructed that as a matter of law the ATF agents were not acting within the scope of their official duties if they were engaged in a personal frolic or acting merely as a private citizen. If you determine that the government has failed to prove beyond a reasonable doubt that ATF Special Agents Steven D. Willis, Robert Williams, Conway C. LeBleu and Todd W. McKeehan (or Special Agent Charles Meyer under Count Four) were acting within the scope of their official duties as agents of the ATF, you must find the Defendants not guilty.

You are instructed that federal law provides that upon the request of a federal law enforcement officer or an attorney for the government, based upon an affidavit containing probable cause, a search warrant may be issued by a federal magistrate for a search of property or for a person within the federal district. Moreover, if it appears from a complaint, a written statement of the facts constituting an offense charged, or from an affidavit or affidavits that an offense has been committed and that the named Defendant has committed it, a warrant for the arrest of the named Defendant shall issue to any officer authorized to execute it. The search and arrest warrants entered into evidence in this case are, as such, lawful process.

AIDING AND ABETTING

Count Two alleges that each named Defendant aided and abetted the other Defendants as well as other unknown persons in the commission of this offense. You are instructed as follows with regard to what "aiding and abetting" means:

Title 18, United States Code, Section 2, provides that the guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be

accomplished by that person through direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

So, if another person is acting under the direction of a defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds that defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Notice, however, that before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the Defendant under consideration was a participant and not merely a knowing spectator.

In other words, you may not find the Defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons and that the Defendant voluntarily participated in its commission with the intent to violate the law.

SELF-DEFENSE

As to Count Two only, you may consider whether the Defendant under consideration was acting in self-defense or defense of another. In this self-defense instruction, the "male gender" pronouns will include Defendant Ruth Riddle.

If a Defendant was not an aggressor, and had reasonable grounds to believe and actually did believe that he or another was in imminent danger of death or serious bodily harm from which he could save himself or another only by using deadly force against his assailants, he had the right to employ deadly force in order to defend himself or another. By "deadly force" is meant force which is likely to cause death or serious bodily harm. A Defendant's mere belief, unsupported by the acts of the victim, do not constitute reasonable grounds.

In order for a Defendant to have been justified in the use of deadly force in self-defense or defense of another, he must not have provoked the assault on him or have been the aggressor. Mere words without more, do not constitute provocation or aggression.

The circumstances under which a Defendant acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the reasonable belief that the other persons were then about to kill or to do serious bodily harm to him or another. In addition, a Defendant must have actually believed that he or another was in imminent danger of death or serious bodily harm and that deadly force must be used to repel it.

If evidence of self-defense or defense of another is present, the government must prove beyond a reasonable doubt that a Defendant did not act in self-defense or defense of another. If you find that the government has failed to prove beyond a reasonable doubt that a Defendant did not act in self-defense or defense of another, you must find that Defendant not guilty. In other words, if you have a reasonable doubt whether or not a Defendant acted in self-defense or defense of another, your verdict must be not guilty as to that Defendant.

If a Defendant had reasonable grounds to believe and actually did believe that he or another was in imminent danger of death or serious bodily harm and that deadly force was necessary to repel such danger, he would be justified in using deadly force in self-defense, even though it may afterwards have turned out that the appearances were false. If these requirements are met, he could use deadly force even though there was in fact neither purpose on the part of the other persons to kill or do serious bodily harm to him or another, nor imminent danger that it would be done, nor actual necessity that deadly force be used in self-defense.

If a Defendant had reasonable grounds to believe and actually did believe that he or another was in imminent danger of death or serious bodily harm and that deadly force was necessary to repel such danger, he was not required to retreat or to consider whether he could safely retreat. He was entitled to stand his ground and use such force as was reasonably necessary under the circumstances to save his or another's life or to protect himself or another from serious bodily harm.

However, if a Defendant could have safely retreated but did not do so, his failure to retreat is a circumstance which you may consider, together with all

other circumstances, in determining whether he went farther in repelling the danger, real or apparent, then he was justified in doing under the circumstances.

Even if the other persons were the aggressors and a Defendant was justified in using force in self-defense, he would not be entitled to use any greater force than he had reasonable grounds to believe and actually did believe to be necessary under the circumstances to save his or another's life or to avert serious bodily harm to himself or another.

In determining whether a Defendant used excessive force in defending himself or another, you may consider all the circumstances under which he acted. The claim of self-defense is not necessarily defeated if greater force than would have seemed necessary in careful reflection was used by a Defendant in the heat of passion generated by an assault upon him. A belief which may be unreasonable in careful reflection may be actually and reasonably entertained in the heat of passion.

You must distinguish resisting arrest from self-defense. If you find that the government has proved beyond a reasonable doubt that a Defendant knew before he acted that law-enforcement officers intended to search Mount Carmel or to arrest one or more of its occupants, and that a Defendant under consideration acted to avoid arrest or to prevent the search of Mount Carmel, you may not acquit that Defendant by reason of self-defense. Additionally, if you are convinced beyond a reasonable doubt that a Defendant prepared to ambush the ATF agents, you may not acquit that Defendant by reason of self-defense.

Generally, the law forbids forcible resistance to law enforcement officers executing search and arrest warrants. Therefore, the general rule is that knowledge of an officer's status in law enforcement would automatically negate any claim of self-defense. However, under the Constitution an individual has the right to be free from the use of excessive force by a law enforcement officer even when that officer is making a lawful search or arrest. It has always been a policy of the law to protect the physical integrity of every person from unauthorized violence. This right arises from the Constitution's guarantee to be free from unlawful attack upon one's person. Therefore, if a federal officer uses excessive force, that is, force that is not reasonable under all the circumstances, a citizen has the right to defend himself from such force. However, the citizen may only use so much force as is necessary to stop the

officer's use of excessive force. A citizen may only use deadly force under the circumstances I have already explained to you.

Therefore, if you determine that the ATF agents caused the Defendant under consideration to reasonably and honestly believe that he or another was about to be killed or receive serious bodily harm due to the agents' purported use of excessive or unreasonable force, then self-defense would be appropriate if all of the above elements are met. On the other hand, if you find that the ATF agents' conduct caused the Defendant under consideration to believe that he or someone similarly situated was about to be arrested or that Mount Carmel was about to be searched, and he acted to resist such arrest or search, then self-defense would not be appropriate.

You are instructed that federal agents are not automatically entitled to use deadly force to make an arrest or to conduct a search. If a suspect threatens an officer with a weapon or if there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm, deadly force may be used to apprehend that suspect. An officer cannot, however, seize an unarmed, nondangerous suspect by shooting him dead.

VOLUNTARY MANSLAUGHTER

I have explained what the government has to prove for you to convict a Defendant of aiding and abetting the murder of a federal agent. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that the Defendant under consideration committed that crime. If your verdict on that is guilty as to a particular Defendant, you are finished with regard to that Defendant. But if your verdict is not guilty as to a particular Defendant, or if you are unable to reach a verdict as to a particular Defendant, you should then consider whether that Defendant is guilty of aiding and abetting voluntary manslaughter.

Manslaughter is the unlawful killing of a human being without malice. Voluntary manslaughter is committed when a human being is killed unlawfully in the sudden heat of passion caused by adequate provocation.

In order for a particular Defendant to be guilty of voluntary manslaughter, you must be convinced beyond a reasonable doubt that the government has proved the following elements:

First: That the Defendant under consideration aided and abetted the killing of ATF Special Agents Steven D. Willis, Robert Williams, Conway C. LeBleu and Todd W. McKeehan without lawful justification;

Second: That the persons killed were federal officers as described above, who were then engaged in the performance of their official duty, as charged;

Third: That the Defendant under consideration acted in the heat of passion; and

Fourth: That the heat of passion was caused by an adequate provocation.

For a determination of whether the person killed was a federal officer who was engaged in the performance of his official duty, refer to the explanation on page ___ of these Instructions.

For a full explanation of "aiding and abetting," refer to page of these Instructions.

"Heat of passion" is such a passion or emotion as naturally would be aroused in the mind of an ordinary reasonable person of average disposition in the same or similar circumstances as confronted the Defendant under consideration at the time the killing occurred. It is such a state of passion, or hot blood, or rage, anger, resentment, terror or fear as to indicate the absence of deliberate design to kill or as to cause one to act on impulse without reflection.

Thus, the law does not consider the peculiarities of a particular Defendant's nature or temperament or condition. It will occur to you that the underlying reason for this rule is the same as that which was the basis of the "reasonable man" rule in the law of self-defense. The passion which was aroused from the facts and circumstances that confronted the Defendant under consideration must be such as also would have aroused the passion of an ordinarily reasonable person likewise situated.

The basic inquiry is whether or not at the time of the killing, the reason and judgment of the Defendant under consideration was obscured or disturbed by

passion--or dethroned, to use another expression--to such an extent as would cause an ordinarily reasonable person of average disposition to act rashly and without deliberation and from passion rather than judgment.

Before you may find that the Defendant under consideration acted in the heat of passion, you must also find that there was "adequate provocation." Provocation, in order to be adequate to reduce the offense from murder to voluntary manslaughter, must be such as might naturally induce a reasonable man in the passion of the moment to lose self-control and to act on impulse and without reflection.

A blow or personal violence or threat of such may constitute adequate provocation. But a trivial or slight provocation, entirely disproportionate to the violence of the retaliation, is not adequate provocation to reduce the offense from murder to voluntary manslaughter. Mere words standing alone, however, no matter how insulting, no matter how offensive, no matter how abusive, are not adequate to reduce the offense.

You should ask yourself whether the ordinarily reasonable man, placed in the same situation in which the Defendant under consideration found himself or herself, and knowing what the Defendant under consideration then knew or believed he or she knew, would have been thrown into such heat of passion?

COUNT THREE

Count Three of the Indictment charges that on or about February 28, 1993, in the Western District of Texas, Defendants, Brad Eugene Branch, Kevin A. Whitecliff, Jaime Castillo, Clive J. Doyle, Livingstone Fagan, Paul Gordon Fatta, Graeme Leonard Craddock, Renos Avraam and Ruth Ottman Riddle did knowingly use and carry a firearm during and in relation to the commission of a crime of violence which may be prosecuted in a court of the United States, to-wit: Conspiracy to Murder officers and Employees of the United States, in violation of Title 18, United States Code, Sections 1117 and 1114, all in violation of Title 18, United States Code, Section 924(c)(1).

ELEMENTS OF COUNT THREE

Title 18, United States Code, Section 924(c)(1) , makes it a crime for anyone to use or carry a firearm during and in relation to the commission of a crime of violence which may be prosecuted in a court of the United States.

For you to find a Defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the Defendant under consideration committed the crime alleged in Count One of the Indictment. I instruct you that Conspiracy to Murder Officers and Employees of the United States is a crime of violence; and

Second: That the Defendant under consideration knowingly used or carried a firearm during and in relation to the Defendant's commission of the crime alleged in Count One of the Indictment.

The government is not required to prove that the Defendant under consideration actually fired the weapon or brandished it at someone in order to prove "use" as that term is used in this instruction. However, you must be convinced beyond a reasonable doubt that the firearm played a role in or facilitated the commission of the crime of violence. In order words, you must find that the firearm was an integral part of the offense charged.

The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. The term "firearm" also includes the frame or receiver of any such weapon, or any firearm muffler or firearm silencer, or destructive device.

COUNT FOUR

Count Four of the Indictment charges that on or about February 28, 1993, in the Western District of Texas, Defendants, Norman Washington Allison, also known as Delroy Nash, and Woodrow Kendrick, also known as Bob Kendrick, by aiding and abetting Michael Schroeder, deceased, named as a principal, but not as a defendant herein, did knowingly, willfully, and unlawfully attempt to kill, with malice aforethought, Charles Meyer, a Special Agent of the Bureau of Alcohol, Tobacco and Firearms, while said agent was engaged in the performance of his official duties, by shooting at Special Agent Charles Meyer with a firearm, in violation of Title 18, United States Code, Sections 1114, 1111(a), and Title 18, United States Code, Section 2.

ELEMENTS OF COUNT FOUR

Title 18, United States Code, Sections 1111 and 1114, make it a crime to kill or attempt to kill a federal official, including an Agent of the Bureau of Alcohol, Tobacco and Firearms, in the performance of his official duties.

For you to find any Defendant guilty of this offense, you must be convinced that the government has proved each of the following elements beyond a reasonable doubt as to that Defendant:

First: That the Defendant under consideration aided and abetted the attempted killing of ATF Special Agent Charles Meyer without lawful justification;

Second: That ATF Special Agent Charles Meyer was a federal officer as described above, who was then engaged in the performance of his official duty, as charged;

Third: That the Defendant under consideration aided and abetted the attempted killing of ATF Special Agent Charles Meyer with malice aforethought; and

Fourth: That the Defendant had the specific intent to murder Special Agent Charles Meyer.

"To attempt to kill with malice aforethought" is defined on pages ___ of these Instructions.

For a determination of whether the victim was a federal officer who was engaged in the performance of his official duty, refer to the explanation on page ____ of these Instructions.

For a full explanation of "aiding and abetting," refer to page ____ of these Instructions.

"Attempt" means to willfully take some action which was a substantial step toward the completion of the crime. In determining whether the Defendant's actions amounted to a substantial step toward the commission of the crime, it is necessary to distinguish between mere preparation on the one hand, and the actual doing of the criminal deed on the other. Mere preparation, which may

consist of planning the offense, or of devising, obtaining or arranging a means for its commission, is not an attempt, although some preparations may amount to an attempt. The acts of a person who intends to commit a crime will constitute an attempt where the acts themselves clearly indicate an intent to wilfully commit the crime, and the acts are a substantial step in a course of conduct planned to culminate in the commission of a crime.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No. W-93-CR-046
	§	
BRAD EUGENE BRANCH (2)	§	
KEVIN WHITECLIFF (3)	§	
CLIVE DOYLE (4)	§	
JAIME CASTILLO (5)	§	
LIVINGSTONE FAGAN (6)	§	
PAUL GORDON FATTA (7)	§	
WOODROW KENDRICK, a/k/a	§	
BOB KENDRICK (8)	§	
NORMAN WASHINGTON ALLISON,	§	
a/k/a DELROY NASH (9)	§	
GRAEME LEONARD CRADDOCK (10)	§	
RENOS AVRAAM (11)	§	
RUTH OTTMAN RIDDLE (12)	§	
Defendants.	§	

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VERDICT FORM

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1) We, the jury, unanimously find each of the following Defendants "Guilty" or "Not Guilty" of the offense of conspiracy to murder federal officers as alleged in Count One of the Indictment:

Brad Eugene Branch _____Not Guilty_____
"Guilty" or "Not Guilty"

Kevin A. Whitecliff _____Not Guilty_____
"Guilty" or "Not Guilty"

Clive J. Doyle	Not Guilty "Guilty" or "Not Guilty"
Jaime Castillo	Not Guilty "Guilty" or "Not Guilty"
Livingstone Fagan	Not Guilty "Guilty" or "Not Guilty"
Paul Gordon Fatta	Not Guilty "Guilty" or "Not Guilty"
Woodrow Kendrick	Not Guilty "Guilty" or "Not Guilty"
Norman Washington Allison	Not Guilty "Guilty" or "Not Guilty"
Graeme Leonard Craddock	Not Guilty "Guilty" or "Not Guilty"
Renos Avraam	Not Guilty "Guilty" or "Not Guilty"
Ruth Ottman Riddle	Not Guilty "Guilty" or "Not Guilty"

2) We, the jury, unanimously find each of the following Defendants "Guilty" or "Not Guilty" of the offense of aiding and abetting unknown principles and each other in the murder of federal officers as alleged in Count Two of the Indictment:

Brad Eugene Branch	Not Guilty "Guilty" or "Not Guilty"
Kevin A. Whitecliff	Not Guilty "Guilty" or "Not Guilty"
Clive J. Doyle	Not Guilty "Guilty" or "Not Guilty"

Jaime Castillo	Not Guilty "Guilty" or "Not Guilty"
Livingstone Fagan	Not Guilty "Guilty" or "Not Guilty"
Paul Gordon Fatta	Not Guilty "Guilty" or "Not Guilty"
Woodrow Kendrick	Not Guilty "Guilty" or "Not Guilty"
Norman Washington Allison	Not Guilty "Guilty" or "Not Guilty"
Graeme Leonard Craddock	Not Guilty "Guilty" or "Not Guilty"
Renos Avraam	Not Guilty "Guilty" or "Not Guilty"
Ruth Ottman Riddle	Not Guilty "Guilty" or "Not Guilty"

For each of the Defendants, if any, that you found "not guilty" in Question # 2, or for each of the Defendants, if any, you were unable to reach a verdict in Question # 2, answer this question. For each of the Defendants, if any, that you found "guilty" in Question #2, do not answer this question with regard to that Defendant.

3) We, the jury, unanimously find each of the following Defendants "Guilty" or "Not Guilty" of the offense of aiding and abetting unknown principles and each other in the lesser included offense of voluntary manslaughter of federal officers, as described in the Instructions:

Brad Eugene Branch	Guilty "Guilty" or "Not Guilty"
Kevin A. Whitecliff	Guilty "Guilty" or "Not Guilty"

Clive J. Doyle	Not Guilty "Guilty" or "Not Guilty"
Jaime Castillo	Guilty "Guilty" or "Not Guilty"
Livingstone Fagan	Guilty "Guilty" or "Not Guilty"
Paul Gordon Fatta	Not Guilty "Guilty" or "Not Guilty"
Woodrow Kendrick	Not Guilty "Guilty" or "Not Guilty"
Norman Washington Allison	Not Guilty "Guilty" or "Not Guilty"
Graeme Leonard Craddock	Not Guilty "Guilty" or "Not Guilty"
Renos Avraam	Guilty "Guilty" or "Not Guilty"
Ruth Ottman Riddle	Not Guilty "Guilty" or "Not Guilty"

4) We, the jury, unanimously find each of the following Defendants "Guilty" or "Not Guilty" of the offense of using or carrying a firearm during and in relation to the commission of a crime of violence as alleged in Count Three of the Indictment:

Brad Eugene Branch	Guilty "Guilty" or "Not Guilty"
Kevin A. Whitecliff	Guilty "Guilty" or "Not Guilty"

Jaime Castillo — Guilty
"Guilty" or "Not Guilty"

Clive J. Doyle — Not Guilty
"Guilty" or "Not Guilty"

Livingstone Fagan — Guilty
"Guilty" or "Not Guilty"

Paul Gordon Fatta — Not Guilty
"Guilty" or "Not Guilty"

Graeme Leonard Craddock — Guilty
"Guilty" or "Not Guilty"

Renos Avraam — Guilty
"Guilty" or "Not Guilty"

Ruth Ottman Riddle — Guilty
"Guilty" or "Not Guilty"

5) We, the jury, unanimously find each of the following Defendants "Guilty" or "Not Guilty" of aiding and abetting Michael Schroeder, deceased, in attempting to kill a federal officer as alleged in Count Four of the Indictment:

Woodrow Kendrick — Not Guilty
"Guilty" or "Not Guilty"

Norman Washington Allison — Not Guilty
"Guilty" or "Not Guilty"

6) We, the jury, unanimously find the Defendant Norman Washington Allison Not Guilty of the offense of using or carrying a firearm during and in relation to the commission of a violent crime as alleged in Court [sic] Six of the Indictment.

7) We, the jury, unanimously find the Defendant Graeme Leonard Craddock Guilty of the offense of possessing an unregistered

destructive device, namely a grenade, as alleged in Court [sic] Seven of the Indictment.

8) We, the jury, unanimously find the Defendant Graeme Leonard Craddock Not Guilty of the offense of conspiracy to Possess an Unregistered Destructive Device as alleged in Court [sic] Eight of the Indictment.

9) We, the jury, unanimously find the Defendant Paul Gordon Fatta Guilty of the offense of conspiracy to unlawfully manufacture and possess machineguns as alleged in Court [sic] Nine of the Indictment.

10) We, the jury, unanimously find the Defendant Paul Gordon Fatta Guilty of the offense of aiding and abetting Vernon Howell in the unlawful possession of machineguns as alleged in Court [sic] Ten of the Indictment.

February 26, 1994
Date

#16
Presiding Juror

APPENDIX H

EXCERPT FROM MEMORANDUM OPINION AND ORDER

April 2, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JOHN T. RISENHOOVER, et al.,	§	
Plaintiffs,	§	
v.	§	Civil No. W-93-CA-138
	§	
COX TEXAS PUBLICATIONS, INC.	§	
et al.,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Pages 7 - 10)

A young man named David Koresh ("Koresh"), then known as Vernon Howell, joined the group in 1984, and soon became embroiled in a struggle for leadership with Lois Roden's son, George ("Roden"). It was during this period that the 24-year-old Koresh married his legally acknowledged wife, a 14-year-old girl by the name of Rachel Jones, who was the daughter of Perry Jones, a prominent member of the sect. In 1985, Koresh and his followers were ejected from Mount Carmel at gunpoint. Koresh led them to the Angelina National Forest near Palestine, Texas, where they lived in plywood boxes, tents and converted school buses. During this period, Koresh declared himself a religious leader and prophet, preaching divinely revealed interpretation of the Seven Seals in the Bible's Book of Revelations, which foretell the end of the world.

While Koresh's religious teaching did not focus on the "Golden Rule," it did focus on para-military training. Koresh armed his followers and led them on a raid of the Mount Carmel complex in 1987. Roden was injured during the

resulting shoot-out, and Koresh and his followers were arrested and tried for attempted murder. All of Koresh's followers were acquitted, and the jury was unable to reach a verdict as to the charges against Koresh.

* * * * *

The ramshackle outbuildings that once made up the Mount Carmel community were consolidated into a large complex, which included living quarters, a chapel, a gymnasium, as well as look-out towers and an armory. Defendants' Exhibit 4. The fort-style building was a reflection of Koresh's apocalyptic mentality and preaching -- the end of the world was near and would be brought about by "the Beast" or "the Babylonians," which he identified as agents of the Government, particularly the ATF. To that end, the Davidians stockpiled food and water, clothing, and weapons, and conducted military-style training. The weapons the group collected included hand-grenades and other explosives, as well as illegal automatic weapons and the parts necessary to illegally convert semi-automatic weapons to fully automatic. This illegal weaponry came to the attention of the ATF, which began an investigation of the cult in 1992.

In his teachings, the false prophet began to identify himself as the born-again Messiah who could somehow cleanse his followers of sin by committing those sins himself. Koresh's role as a "messiah" included exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples. Allegations of child-abuse arose when Koresh's custom of "marrying" girls as young as twelve was revealed during a child custody hearing in Michigan involving one of his followers, Sherri Jewell. These charges attracted the attention of the media, both foreign and domestic. The Waco Tribune-Herald[3] ("the newspaper" or "the Trib") began an in-depth investigation of the cult, which came to the attention of the ATF sometime in late 1992 or early 1993.[4]

---

[3] The Waco Tribune-Herald is a newspaper published each morning in Waco by Defendant Cox Texas Publications, Inc. Defendant Cox Enterprises, Inc. is the ultimate parent company of Cox Texas Publications, Inc.

[4] The newspaper's plans to publish the series were apparently not a secret. Koresh knew that an article was to be published. Blansett Dep. at 72. Newspaper reporter Tommy Witherspoon informed KWTX cameraman Dan Mulloney of the series two to three weeks before its publication. Deposition of Dan Mulloney ("Mulloney Dep.) at 67.

During December 1992, the ATF instituted plans to obtain and execute an arrest warrant for Koresh and a search warrant for the Mount Carmel Center. Testimony of Bill Buford, dated January 25, 1994 ("Buford TR")[5] at 27, 107-109, 113. The planning and execution of the raid were in the hands of Phillip Chojnacki ("Chojnacki") (the Incident Commander) and his immediate subordinate Chuck Sarabyn ("Sarabyn") (the Tactical Coordinator). The decision was made to conduct a "dynamic" entry into the Compound, which depended for its success on the element of surprise. Testimony of Danny Curtis, dated January 19, 1994 ("Curtis TR") at 95; Testimony of Roland Ballesteros, dated January 18-19, 1994 ("Ballesteros TR") at 85; Testimony of Ward Clayton Alexander III, dated January 21, 1994 ("Alexander TR") at 43; Testimony of Barbara Maxwell, dated January 21, 1994 ("Maxwell TR") at 30. The element of surprise was necessary in order to reduce, or prevent, the possibility of injuries to those involved -- Davidians as well as agents. Buford TR at 98; Ballesteros TR at 158. ATF Director Stephen Higgins ("Higgins") ordered the field commanders to cancel the operation if they learned that the secrecy of the raid had been compromised. Testimony of ATF Director Stephen Higgins before the Subcommittee on the Treasury, Postal Service and General Government Appropriations of the House Appropriations Committee ("Higgins Test.") , dated June 9, 1993, at 60, 74.

In January 1993, the ATF set up an undercover operation in a house across from the Compound.[6] Plaintiff Robert Rodriguez ("Rodriguez") was one of the agents assigned to the undercover house. The agents' job was to infiltrate the Compound and discover as much as possible about its physical layout and the habits of its residents. Rodriguez visited the Compound a number of times over the next few weeks, managing to establish a relationship of sorts with Koresh. Rodriguez TR at 6-7, 78, 90, 110-11, 113-14, 132.[7]

* * * * *

---

[5] References to "TR" are to transcripts of testimony at the criminal trial in United States v. Branch, et al., Criminal Action No. W-93-CR-046.

[6] The road separating the Compound from the undercover house has been referred to as EE Ranch Road and Double EE Ranch Road. For clarity, the Court will use Double EE Ranch Road. Geographically, Double EE Ranch Road runs in front of the Compound and intersects with Farm-to-Market Road 2491 ("FM 2491") and Old Mexia Road.

[7] Later testimony at the criminal trial would reveal that the Davidians were suspicious of the undercover agents who appeared too old to be the TSTC students they pretended to be.

(Pages 24 - 25)

The various media individuals then noticed two cattle trailers turning onto Double EE Ranch Road off of FM 2491. The KWTX vehicle followed the trailers onto the Compound property, while the newspaper vehicles stayed back. At approximately the same time the cattle trailers arrived at the Compound, the supporting Texas National Guard helicopters also arrived. The ill-fated raid had begun.

The cattle trailers stopped in front of the Compound's main building. Koresh appeared at the front door and yelled, "What's going on?" The ATF agents identified themselves, stated they had a warrant, and yelled "Police" and "Lay down." Koresh slammed the door before the ATF agents could reach it. Gunfire from inside the Compound burst through the door and erupted from windows in the front of the Compound. The ATF agents returned fire. Ballesteros TR at 12-13, 17-23, 44-46; Risenhoover Dep. at 95, 104; Curtis TR at 17, 20. When the shooting began, the various media individuals took cover in ditches beside the road. They remained pinned down until a cease fire had been arranged. Aydelotte Dep. at 32-33, 35-38, 41; Does Dep. at 27-28; England Dep. at 59-60, 63-64, 67-68; MeLemore Dep. at 28-29, 43-44, 86.

After the shooting ceased, four ATF agents lay dead, while numerous others sustained gunshot and shrapnel-related injuries. Defendants' Exhibit 3, Affidavit of Earl Dunagan at 2. Numerous Branch Davidians were also killed during the shoot-out, including Perry Jones. Others, including Koresh, were wounded. A siege then began under the command of the Federal Bureau of Investigation ("FBI") , with only a few of the Davidians emerging from the Compound over the next couple of weeks. The FBI's decision to mount a forceful assault on the Compound on April 19 ended in tragedy, when the building and all but a handful of its inhabitants were consumed in a conflagration set by the Davidians.

* * * * *

Signed this 2d day of April, 1996.

/s/ Walter S. Smith, Jr.
United States District Judge

APPENDIX I

EXCERPT FROM REPORT OF THE DEPARTMENT OF THE TREASURY ON THE INVESTIGATION OF VERNON WAYNE HOWELL

September 1993

(from page 73)

Securing Search and Arrest Warrant

After Aguilera and Chojnacki briefed ATF officials, including Director Higgins and ADLE Hartnett, in Washington, D.C., on February 11 and 12, Chojnacki received approval to seek both an arrest warrant for Koresh and search warrants for the Compound and the Mag Bag. On February 25, Aguilera signed a sworn affidavit he had prepared with the assistance of Assistant U.S. Attorneys Bill Johnston and John Phinizy. On the same day, after reviewing the affidavit, Dennis Green, U.S. Magistrate-Judge for the U.S. District Court for the Western District of Texas, issued an arrest warrant for Koresh for violating federal firearms laws and a warrant to search both the Mag Bag and the Compound for evidence of that crime.

* * * * *

APPENDIX J

EXCERPTS FROM ORDER
United States v. Branch

October 4, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No. W-93-CR-046
	§	
BRAD EUGENE BRANCH (2)	§	
KEVIN A. WHITECLIFF (3)	§	
CLIVE J. DOYLE (4)	§	
JAIME CASTILLO (5)	§	
LIVINGSTONE FAGAN (6)	§	
PAUL GORDON FATTA (7)	§	
WOODROW KENDRICK, a/k/a	§	
BOB KENDRICK (8)	§	
NORMAN WASHINGTON ALLISON,	§	
a/k/a DELROY NASH (9)	§	
GRAEME LEONARD CRADDOCK (10)	§	
RENOS AVRAAM (11)	§	
RUTH OTTMAN RIDDLE (12)	§	

ORDER

Came on this date to be considered the Motions to Suppress filed by the various Defendants in this action. Having reviewed the briefs and argument of counsel, as well as the evidence presented, the following disposition is made:

1. Motions to Suppress for Failure to "Knock and Announce." The Defendants seek to suppress all evidence seized as a result of the search of the Mt. Carmel compound, asserting that the Government violated Title 18, United

States Code, Section 3109 ("§ 3109") and the Fourth Amendment by failing to "knock and announce" prior to using force to gain entry to the compound to execute a search warrant.

* * * * *

The uncontradicted testimony of Roland Ballesteros ("Ballesteros") of the Bureau of Alcohol, Tobacco and Firearms ("ATF") indicates that an announcement was given and that the inhabitants of the compound refused entry. Ballesteros was the third agent off the cattle truck parked near the front door of the compound. His responsibility was to enter the fenced area immediately surrounding the compound and to gain entry through the front door. The two agents who exited the truck in front of him were responsible for subduing the dogs which were believed to be kept within the fenced area.

The agents involved in the raid were dressed in standard special response team gear, which consisted of Kevlar helmets and vests with a distinctive law enforcement badge. These vests also were clearly marked with either "Police" or "ATF". Any reasonable individual viewing the agents on that day could not mistake their identity.

While running toward the fenced area, Ballesteros noticed gunfire coming from a direction to the left and above him, which he believed came from within the compound. Although the agents dispatched to secure the dogs were ordered to shoot them if necessary, Ballesteros testified that the gunshots he heard did not come from the dog run, but rather from the tower or some other compound building. After entering the fenced area, Ballesteros observed David Koresh, a/k/a Vernon Howell ("Koresh") standing in the open front door with other figures behind him. Ballesteros yelled loudly, "Police. Search Warrant. Lay Down." Koresh responded, "What's going on?" Ballesteros, continuing to run toward the front door, again yelled, "Police. Search Warrant. Lay Down." When Ballesteros was approximately 15 feet from the door, Koresh shut it. Ballesteros landed on the front porch and attempted to open the door. He did not politely knock on the door or again announce his identity as a police officer attempting to serve a search warrant. Bullets then began exiting through the door from inside the compound (20 to 30 rounds), and Ballesteros sustained a wound in his left hand.

This testimony clearly indicates that Ballesteros announced the identity and purpose of the agents entering the compound property, that his announcement

was understood by Koresh, who was standing at the door, and that entry was denied in the strongest terms possible.

* * * * *

ORDERED that the Motions to Suppress filed by Brad Eugene Branch, Kevin A. Whitecliff and Jaime Castillo, and adopted by Defendant Norman Washington Allison, are DENIED.

* * * *

SIGNED this 4th day of October, 1993.

/s/ WALTER S. SMITH, JR.
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEBBORAH BROWN, et al.,	§	
	§	
Plaintiffs,	§	
	§	Docket No. W-96-CA-142
-VERSUS-	§	
	§	JUDGE WALTER S. SMITH, JR.
UNITED STATES OF AMERICA, et al.,	§	
	§	
	§	
Defendants.	§	
----------	§	

STATE OF TEXAS }
} ss
COUNTY OF BEXAR }

AFFIDAVIT OF SARAH L. BAIN

Before me, the undersigned authority, personally appeared Sarah L. Bain, who, being by me duly sworn, deposed as follows:

1. My name is Sarah L. Bain. I served on the trial jury in the case of United States v. Brad Eugene Branch, et al, W-93-CR-046. I was chosen to be Foreperson when the case was submitted to the jury. Information concerning me is available in the court records. I have been asked by lawyers for the plaintiffs in this case who have interviewed me to give this affidavit which I understand will be submitted in support of a motion by plaintiffs asking that Judge Walter S. Smith, Jr., be disqualified from presiding over the case.

2. I never heard of Judge Walter S. Smith, Jr. before I was called for jury duty in this case.

3. During the trial I had the feeling that Judge Smith was favoring the prosecution in his rulings and heard several comments by jurors, or alternates, to that effect.

4. During jury deliberations, it became clear that nearly all the jurors were deeply disturbed, as I was, by the extremely provocative acts of the ATF agents when they approached Mt. Carmel in mass and with helicopters on February 28, 1993. The testimony about harassment and taunting of Church members by the FBI during the 51 day siege was also very disturbing and I believe made peaceful resolution unlikely. Evidence of the six hour attack on the people including children at Mt. Carmel with gas and the huge tanks smashing into the building with so many people in it, and finally crushing the back end of the building was probably most disturbing of all. Some jurors said, and I fully agree, that the wrong people were on trial. The raid planners for both ATF and FBI should answer to charges. I never detected that any of this government activity upset Judge Smith.

5. We acquitted all defendants of the first two counts of conspiracy to murder and aiding and abetting murder. We did not believe the defendants ever planned, or intended to murder anyone. If we had understood that self defense applied to the lesser included offense of voluntary manslaughter we could have acquitted the five defendants we found guilty of voluntary manslaughter, who we had already found not guilty of murder. We thought it was a much less serious offense than murder and we hoped to emphasize that the actions of the ATF had "provoked" a reaction by the defendants.

6. The jury felt strongly that Judge Smith should be lenient. While waiting for the verdict to be read in open court, several of us voiced the opinion that Katherine Schroeder was going to regret being separated from the other defendants since the prison time they faced on all charges would surely be so much shorter than the prison time she faced. I was horrified when he imposed 40 year sentences on these men who had already lost family, friends, their home, their Church and their possessions. I believe Judge Smith not only ignored our verdict of not guilty of murder, but that he misused our jury and verdict to punish people he had come to scorn. I was present at the sentencing and could not believe Judge Smith was quoting as true a witness' testimony that the jury had found not credible. I found even more disturbing that he said we had found the five defendants guilty of murder by our guilty verdict on the firearm count. We unanimously found all defendants not guilty of murder. We never imagined a verdict on carrying or using a firearm could be twisted into

a reversal of our clear decision that no defendant committed murder. Only a deep prejudice would so distort our decision.

7. The jury did not find and did not have evidence from which we could have found that the Church members ambushed the ATF. It is absurd to say people inside Mt. Carmel ambushed a large, heavily armed force of federal agents that observed the activities at Mt. Carmel for weeks as it planned a dynamic entry by force into the Church. We could not determine and did not decide the first shots were fired from inside the Church. Nor could we determine that the helicopters did not fire on the Church, in part because the gunfire heard on the helicopter video tape sounded too close and too clear to have come from the ground. The evidence certainly did not justify calling the Church a fortress or a compound. It was just a large frame building which provided no protection to those inside. Shots fired from the ATF often passed through several walls and the tanks smashed right through the walls, well into the interior of the building. There was no evidence to support a claim that all but a handful of the Church members committed suicide or murdered each other. We were troubled by the autopsy reports stating that there were 15 or so bodies with gunshot wounds. But there was no evidence to support that nearly all the 74 deaths were a result of "suicide and murder inflicted by Davidian on Davidian." The jury did not determine that Church members started the fire. After the FBI had cut off the electricity necessitating the use of Coleman lanterns and after six hours of gassing and tanks smashing a fragile frame building, anything could have started the fire. Judge Smith could only make such statements if he bore some prejudice against the defendants and their Church and other possibilities did not matter to him.

8. I consider myself to be a reasonable person. I firmly believe that any reasonable person reviewing all the facts fairly would have grave doubts, as I do, about the ability of Judge Smith to preside impartially over a trial in which the rights of the Mt. Carmel Church and its members are being asserted against the U.S. government and government agents for the injuries, deaths and devastation that occurred at the Church in 1993.

/s/ Sarah L. Bain

SWORN TO AND SUBSCRIBED before me
on the 22 day of May, 1996.
My commission expires: 5-21-97
Margie Jimenez
NOTARY PUBLIC, State of Texas

APPENDIX L

EXCERPTS FROM THE PRE-TRIAL TESTIMONY OF ROLAND BALLESTEROS

(*United States v. Branch*)

September 30, 1994

Transcript, page 49, lines 1 - 14:

was gunfire going on, I had a --

Q Well, at that point, there was not gunfire, right?

A Yes, there was.

Q Well, you said --

A There were shots being fired, but there was not -- it wasn't a barrage of gunfire until I was at the front door, but there were pops going off, like I said earlier.

Q How many pops went off before you tried to open the front door?

A I couldn't say. I know it was maybe over 20 from that small caliber, as I was exiting the vehicle and also as I was standing at the front door. There was a zip, sounded like a machine gun just -- you know -- and I could see the rounds just passing in front of me or the wood splintering in front of me.

* * * * *

APPENDIX M

EXCERPTS FROM THE TRIAL TESTIMONY OF JACK ZIMMERMAN

(*United States v. Branch*)

February 16, 1994

Transcript, page 6594, line 1 through page 6597, line 22:

the front area.

Q And why did you examine that area, Mr. Zimmerman?

A A primary concern to us -- or at least one of the primary concerns to us was, how did this shootout start?

Q All right. And what did you observe?

A We went to determine whether or not the physical evidence would match what we were told about the locations of bullet holes on the initial flurry.

Q And can you describe the damage that you saw to the right-hand door when you were outside or when you were at the Mount Carmel Center on April 1st?

A Yes. The information I was trying to verify would -- there would be a spray pattern.

MR. JOHNSTON: Your Honor, excuse me. I'm going to object to him predicating an answer with what he was told and trying to verify it.

THE COURT: Sustain the objection.

MR. COGDELL: I'll rephrase.

BY MR. COGDELL:

Q Without commenting upon the information that you received, would you just tell us what you saw?

A Yes, sir. I saw a spray pattern concentrated on the right door of what appeared to me to be bullet holes coming from the outside in, most of which, by the size of the hole, appeared to be caused by a rifle. Now, there was a larger hole, and I can't tell you what caliber, but it was a larger hole that my conclusion was, is that it was probably caused by something as big as maybe a .45 pistol or something like that.

Q All right. Now --

A I just remembered, Mr. Cogdell, if I may, I didn't finish an answer earlier --

Q Yes.

A -- when you asked me about my military background. As a reserve Lieutenant Colonel, I commanded the 1st Battalion, 23rd Marines, an infantry battalion, and was using that background for many of the conclusions that I was drawing when we went on this tour. And I apologize for not telling you that earlier.

Q There -- there were -- there was a left-hand side to that door, Colonel, --

A Yes.

Q -- and there was a right-hand side to that door?

A Correct.

Q Could you estimate for the jury whether the right-hand side of the door had more shots or more holes in it than the left-hand door, or did it have an equal number or a smaller number? Which door had more holes in it?

A To be honest with you, I thought almost all of the holes were on the right-hand side. There may have been some on the left, but it wasn't what I was look -- I wasn't looking at the left-hand side of the door.

Q Why not?

A Because I was trying to verify the defensive theory that I had been developing.

Q All right. Now, you said that most of the holes on the right-hand side of the door appeared to be coming from outside to inside?

A I'll be candid with you. I didn't see any that came from the inside out on that right-hand side of the door.

Q All right. And based upon -- or what do you base your opinions on as to whether or not those shots were being fired from the inside to outside, other than what you had been told?

A Just the appearance of the holes.

Q How does the entry hole into a door differ from an exit hole?

A Well, it would depend on what the material was. But metal, for example, the entrance hole through metal, you would see the -- a cleaner surface on the entry hole. The exit hole then would have the metal flared out as the bullet passed through the metal, just to use that as an example.

Q All right. Now, this is a steel and core-form door here, I think we are talking about?

A I -- I really don't know exactly what it was made of, to be honest with you.

Q All right. And -- and why is it your opinion or why do you -- why do you believe that the holes in this door, or the majority of the holes in this door were entry wounds, coming from outside to inside?

A Because of the appearance of the holes.

Q And how would they differ from exit wounds -- or exit holes?

A The appearance would differ because you would see the metal flared outward as it was coming from -- if the hole had originated inside the house and

was coming through that door, you would expect to see the metal flared out on the outside of the door.

Q And did you see that?

A I did not. And I -- we didn't have a lot of time. Now, there may have been one or two or more than that, but I didn't see them.

* * * * *

Supreme Court, U. S.
FILED
OCT 9 1997
CLERK

No. 97-429 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In re: **ISABEL ANDRADE, *et al.***

Petitioners

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF THE *AMICUS CURIAE*[1]

In my private practice,[2] I concentrate on matters of legal and judicial ethics. I also frequently lecture on these topics, and have authored a number of articles on attorney and judicial disqualification and related subjects.

I am also the author of Judicial Disqualification: Recusal and Disqualification of Judges, which was published by Little, Brown & Company of Boston in 1996. That treatise, which is nationwide in scope, discusses in detail the principles which have been espoused by the nation's courts in deciding judicial disqualification motions and appeals. I am Vice-Chair of the Alameda County Bar Association Ethics and Professionalism Committee and incoming Vice-Chair of the Bar Association of San Francisco Ethics Committee.

Because of my academic and legal work in this field, I am very interested in and concerned about the development of the law of judicial disqualification. My brief is intended to assist the Court in determining whether either 28 U.S.C. §§ 144 or 455 mandated disqualification of the district judge in these cases; and, if not, whether reassignment or remand would have been appropriate.

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[1] This brief was authored entirely by the amicus curiae; who, as the Court may be aware, is the author of a nationwide treatise on the subject of judicial disqualification, Judicial Disqualification: Recusal and Disqualification of Judges (Little Brown & Co., Boston 1996). Counsel of Record for Petitioners, Caddell & Chapman, made a partial monetary contribution to the preparation of the brief. Pursuant to Rule 37.3 of the Rules of the Court, the parties have consented to the filing of this brief. The letter of consent has been filed with the Clerk of the Court.

[2] I am an attorney-at-law duly licensed to practice before this Court and the state courts of California, New York and New Jersey, the D.N.J., S.D.N.Y., N.D.Cal. and C.D.Cal., and the Fifth, Sixth, Ninth and Federal Circuit Courts of Appeal.

SUMMARY OF ARGUMENT

> "The remedy by appeal is inadequate. It comes after the trial and if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."--Berger v. United States, 255 U.S. 22, 36 (1921).

In Berger v. United States this Court held that if a party timely files an affidavit setting forth facts which, if true, "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," the challenged judge has no discretion to deny the application. Id. at 33-34. Petitioners satisfied the procedural requirements of § 144 by filing affidavits setting forth their reasons for believing the judge was biased against them, as well as a counsel's certificate stating the affidavits were made in good faith. The judge did not deem these to be untimely.[3]

As will be shown, the facts set forth in petitioners' affidavits, if assumed to be true (as they must be), were more than sufficient to "invoke the operation of the act." Id. at 36. The challenged judge, moreover, did not expressly find to the contrary. Instead, in his order denying disqualification he declined to mention the affidavits at all. If Berger continues to have vitality--as this Court's opinion in Liteky v. United States, 510 U.S. 540 (1994) demonstrates that it does--that error should be corrected now, not after trial when the damage to the parties' and public's confidence in the integrity of the judicial system has already been done.

Disqualification was also compelled by § 455(a). Liteky makes clear that a judge's remarks will support a partiality challenge "if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible" [Id. at 555]. In denying disqualification, the judge did not explain why the comments he had made about the Branch Davidian sect of the Seventh Day Adventist Church in other cases do not reveal the requisite degree of animosity. As will be shown, the remarks petitioners complain of reveal at

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[3] Likewise, while § 144 on its face calls for only one affidavit in each case, the judge did not decline to consider additional affidavits on this ground.

least as great a degree of antagonism towards that religious group as Judge Landis' *alleged* comments in Berger revealed about German-Americans.[4]

These issues were brought to the attention of the Fifth Circuit by way of a Petition for a Writ of Mandamus. Petitioners requested that the case be reassigned to another judge on remand, arguing that even if disqualification was not statutorily mandated, the cases should have nevertheless been reassigned to another judge in the interests of justice. On June 9, 1997, a Fifth Circuit panel denied the petition without revealing what standard the Court employed in deciding that reassignment would not be in the interests of justice (if such a determination was made at all).

Although the court below did not explain why reassignment would not be just in the circumstances, different circuits have applied different tests for determining whether appellate reassignment is warranted. This split, coupled with the fact that this Court has yet to prescribe the appropriate reassignment standard, has led to much confusion. This is a matter of concern because it appears that reassignment requests are becoming increasingly more common. With *dicta* from Liteky which suggests that it may be easier for a party to obtain reassignment of a federal trial judge on remand than upon direct motion, it may be predicted that, absent guidance from this Court, the number of applications for this type of relief will continue to grow.

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[4] Likewise, the trial judge conveyed favoritism towards the government--even the foreperson of the jury which convicted several Branch Davidians on some charges thought so.

It should be noted, moreover, that were this Court to have permitted Judge Landis to remain on as trial judge in Berger, the fact-finding function would have been insulated, at least to some extent, by the fact that petitioners were entitled to a jury trial. Here the challenged judge is presiding as sole trier of fact on petitioners' F.T.C.A. claims.

REASONS FOR GRANTING THE WRIT

I. DISQUALIFICATION UNDER § 144

A. Historical Background

Edicts designed to assure judicial impartiality have been in place since ancient times.[5] However, prior to 1911 federal law did not prescribe disqualification on bias grounds. In that year Congress enacted § 21 of the Judicial Code of 1911, the precursor to modern day § 144--provided that:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed....

There is little doubt Congress intended the new statute to be peremptory. See, e.g., State of Idaho v. Freeman, 507 F. Supp. 706, 715 & n.8 (D. Idaho 1981). See generally Frank, Disqualification of Judges, 56 Yale L.J. at 628 (1947). However, Congress, worried that such a provision might be susceptible to abuse, engrafted upon § 21 several procedural limitations. See Berger, 255 U.S. at 26-27.

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[5] See, e.g., BABYLONIAN TALMUD, Tractate Shabbath 10a, quoted in 1 E. Quint & N. Hecht, JEWISH JURISPRUDENCE 6 1980 ("[e]very judge who judges a case with complete fairness even for a single hour is One, blessed be He, in the work of creation"). See also, Leubscorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. Rev. 237, 248 (1987).

B. The Berger Case

Congress' first 'peremptory disqualification' statute[6] initially came before this Court in Berger. In that case petitioners submitted, on "information and belief,"[7] a single affidavit in which they opined that Judge Landis was biased against them because they were German, of German extraction, or "impleaded with" those who were. Id. at 28-30. From the comments Judge Landis was alleged to have made, it could be inferred that he was antagonistic to German-Americans because he considered them to be disloyal to the government.[8]

Mr. Justice Day noted in dissent that the statements petitioners attributed to Judge Landis had not been made about petitioners themselves, but during the course of sentencing a different defendant who had been convicted by a jury of violating the Espionage Act. Further, the stenographic report of what the judge said at the sentencing hearing did not reflect that he had actually made the pejorative remarks attributed to him. Nevertheless, a majority of this Court held that the challenged judge had no discretion to deny the motion.[9] It noted that while the moving party's affidavit must give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," the statute "withdraws from the presiding judge a decision upon the truth of the matters alleged." Id. at 33-34, 36.

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[6] As petitioners mentioned in their brief, the House Judiciary Committee is currently considering legislation which would permit litigants to have a case peremptorily reassigned to another district judge without any showing of cause whatsoever, and without the challenged judge having any discretion to deny reassignment. Amendments to H.R. 1252.

[7] Unlike the affiants in Berger, the petitioners here did not merely allege what Judge Smith said merely on "information and belief." Rather, they appended exhibits which set forth those comments.

[8] As this Court noted in Liteky, the judge was alleged to have said, inter alia, that "[o]ne must have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans' because their 'hearts are reeking with disloyalty.' " Liteky, 510 U.S. at 555.

[9] The court also noted that perjury statutes and disbarment proceedings provided sufficient safeguards against abuse.

C. The Affidavits in This Case

Of course no two cases are exactly alike, and the trial judge in this case did not, in sentencing the convicted Branch Davidians, employ the exact same words Judge Landis was alleged to have used in sentencing a convicted German-American. Like Judge Landis, however, Judge Smith did make comments from which it may be inferred that he questions the loyalty of the class to which the decedents and many of the petitioners belong.[10] In fact, Judge Smith not only expressed the belief that the Branch Davidians and their supporters were "disloyal" to the U.S. government,[11] but that they were bent on seeking violent confrontation with it:

> It was a part of the beliefs of the Branch Davidians, expressed and taught by their leader, that they must bring about a violent conflict with federal agents, thereby forcing the agents to use deadly force against them... [12]

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[10] In Berger, petitioners' claim was predicated exclusively on their "information and belief" claim that Judge Landis had previously made comments about a class to which petitioners belonged (German-Americans). The Court did not require them to demonstrate that he had any bias "personal" to them.

[11] During the sentencing hearing in U.S. v. Branch, the following exchange occurred between one of the defense counsel and Judge Smith:

> Mr. Tinker: I do know that you're--as Your Honor mentioned, that members of the public had written in an effort to hopefully assist your honor and--and demonstrate what the public feeling is. Whether or not Your Honor feels that was a concerted effort by people who represent the--the accused and the defendants in this case, I don't know. But, in any event, we know what the jury would do. . . .
>
> The Court: It's a concerned effort by people who are so anti-government that they would take that position anywhere, any time.

Appendix A to Amicus Curiae Brief, pp. 1a. This portion of the record was part of the record before the trial court and before the Fifth Circuit Court of Appeals in petitioners' case.

[12] Joint Petition for Writ of Certiorari ("Joint Petition") Appendix D at p. 26a.

Unlike Judge Landis, moreover, Judge Smith did not confine himself to questioning the *loyalty* of the class. He also made comments expressing disdain for their religious beliefs,[13] as well a very strong opinion of the facts which gave rise to *these* cases.

In United States v. Branch, W-93-CR-046, aff'd in part, 91 F.3d 699 (5th Cir. 1996), he made the following comments, among others:

- "These Defendants, and other adult Branch Davidians, engaged in a conspiracy to cause the deaths of federal agents."

- "... the first shots were fired from inside the front door of the Compound." (i.e., by the Branch Davidians)

- "... by a combination of suicide and murder inflicted by Davidian upon Davidian, all but a handful of the Davidians were killed."[14]

Similarly, in the related case of Risenhoover v. Cox Texas Publications, Inc., *et al.*, W-93-CA-138, Judge Smith made the following comments, among others:

- "While Koresh's religious teaching did not focus on the Golden Rule, it did focus on para-military training."

- The FBI's decision to mount a forceful assault on the Compound on April 19 ended in tragedy, when the building and all but a handful of its inhabitants were consumed in a conflagration set by the Davidians."[15]

The affidavits petitioners submitted in support of their § 144 motion--if true--demonstrate that none of these comments are accurate. For example, while Judge Smith stated that "[i]t was part of the beliefs of the Branch Davidians, expressed and taught by their leader, that they must bring about a

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[13] At one point, for example, he characterized the Branch Davidians' sect leader David Koresh as a "false prophet." Joint Petition Appendix H at p. 57a.

[14] Joint Petition Appendix D at p. 26a.

[15] Joint Petition Appendix H at pp. 56a-57a and 59a.

violent conflict with federal agents...," petitioner Clive Doyle averred that the religious beliefs of the Branch Davidians "never caused us to want or bring about a violent conflict with federal agents, or anyone else," and "David Koresh never preached we should go looking for a fight with anyone." Likewise, whereas the judge opined that "[w]hile Koresh's religious teaching did not focus on the Golden Rule, it did focus on para-military training," Doyle averred that "...[t]he Golden Rule was read and discussed in the Church, probably everyday by someone...[w]e believe in the Golden Rule and try to practice it..." and "[p]aramilitary training was never a part of our religious teaching." Doyle also averred that while Judge Smith has decreed David Koresh to be a "false prophet," the people of his sect continue to believe that "Koresh was a true prophet;" that the Davidians "didn't start" the fatal fire; and that they did not "believe in suicide" and did not "kill each other."[16]

Bonnie Clark Haldeman, David Koresh's mother, also submitted an affidavit. In it she alleged that, contrary to what Judge Smith said, David Koresh believed and frequently discussed the Golden Rule, the Church was not a "fort style" reflection of David Koresh's "apocalyptic mentality," and "[t]he only reason for the existence of our Church was for religious purposes."[17]

Since under Berger § 144 affidavits must be assumed to be true, Mr. Doyle's and Ms. Haldeman's affidavits are more than legally sufficient to compel the district judge's disqualification under that provision. However, petitioners also submitted an affidavit from Sarah L. Bain, the foreperson of the jury which convicted several United States v. Branch defendants of (mainly) firearms violations. Ms. Bain testified that upon attending the sentencing hearing in that case she was deeply disturbed to hear Judge Smith state that the Branch defendants, which the jury had just acquitted of murder and conspiracy charges, had in fact committed murder and conspired to do so, thus "twist[ing] into a reversal of our clear decision that no defendant committed murder."[18] Further according to Ms. Bain, while Judge Smith somehow concluded that the first shots on February 28, 1993 were fired from

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[16] Appendix B to Amicus Curiae Brief at pp. 3a-5a. The Doyle affidavit was part of petitioners' record in the trial court and Fifth Circuit .

[17] Appendix C to the Amicus Curiae Brief at pp. 7a-8a. The Haldeman affidavit was part of Petitioners' record in the trial court and Fifth Circuit.

[18] Joint Petition Appendix K at pp. 65a-66a.

inside the Church, the jury "could not determine and did not decide" this; "[t]he jury did not determine [as Judge Smith did] that Church members started the fire;" "[t]he evidence certainly did not justify calling the Church a fortress;" "[t]here was no evidence to support a claim that all but a handful of the Church members committed suicide or murdered each other;" and "there was no evidence to support [Judge Smith's expressed belief that] nearly all of the 74 deaths were a result of 'suicide and murder inflicted by Davidian on Davidian.'"[19]

If all of Ms. Bain's statements are assumed to be true, neither her expressed belief that "Judge Smith could only make such statements if he bore some prejudice against the defendants and their Church and other possibilities did not matter to him," nor her opinion that "Judge Smith not only ignored our verdict of not guilty of murder but ... misused our jury and verdict to punish people he had come to scorn,"[20] can be discounted. Certainly the comments undeniably made by Judge Smith--at least as much as those that had merely been attributed to Judge Landis "on information and belief"--are of the type which give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

II. DISQUALIFICATION UNDER § 455(a)

A. The Standard for Disqualification Under § 455(a)

Section 455(a) prescribes that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Over the years there has been debate about the point of view from which the question of whether a judge's impartiality might reasonably be questioned is to be determined. However, most courts now appear to agree that disqualification is warranted whenever a reasonable member of the public, if aware of all the relevant facts, would

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[19] Joint Petition Appendix K at p. 66a. The amicus realizes Judge Smith may have been privy to evidence which he deemed inadmissible and which, therefore, never reached the jury. If so, however, the arguments for disqualifying Judge Smith from presiding over these cases would appear to be even stronger.

[20] Joint Petition Appendix K at pp. 65a-66a.

question the judge's ability to be impartial. See, Liljeberg v. Health Services Acquisitions Corp., 486 U.S. 847, 860 (1988).

That a reasonable person would harbor doubts about the impartiality of a judge assigned to sit as a trier of fact who, prior to hearing any evidence in a case, expressed an emphatic opinion about the merits of that case, can hardly be gainsaid. The key question, therefore, is whether the "extrajudicial source" rule provides an exception to § 455(a) in the circumstances of these cases.

B. The Judge's Comments Go to the Merits of This Case

Judicial bias is ordinarily not presumed merely because a judge has developed views about matters of law, public policy or the general subject matter of a case. Likewise, the mere fact that a judge has expressed himself on a particular point of law or policy is generally deemed an insufficient basis for inferring the type of personal bias which would prevent the judge from being impartial in the trial of a case.[21] See, e.g., U.S. v. State of Alabama, 828 F.2d 1532, 1543-1544 (11th Cir. 1987) (per curiam), cert. denied sub nom., Board of Trustees of Alabama State University v. Auburn University, 487 U.S. 1210 (1988). Unlike the utterance of an opinion as the applicable law or public policy, however, the prior expression of an opinion on the merits of a pending matter is not an activity which the public either expects of judges or has any reason to encourage. Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges, 35 Case Western L. Rev. 662, 696 (1985).

Both the litigants and the public have the right to expect that a judge will make an honest assessment of the facts based upon the evidence submitted in each case. Stretton v. Disciplinary Bd. of S. Ct. of Pa., 944 F.2d 137, 144 (3rd Cir. 1991). A judge who has expressed a predisposition as to the merits of a case prior to its filing is not likely to be capable of making such an assessment. See Zavesky v. State, 558 N.E.2d 1124, 1126 (Ind.App. 1990) (bias exists where the judge has expressed an opinion on the merits of the controversy before him).

These cases do not involve the familiar situation in which disqualification is sought on the basis of the judge's view of matters of law or

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[21] But see, e.g., Public Utilities Commission v. Pollack, 343 U.S. 451 (1952)(Frankfurter, J.).

public policy. Rather, they present the highly unusual circumstance of a judge who, in prior cases, made comments which show that he has formed a firm, if not a fixed opinion of the applicable facts of these cases. Thus, while Judge Smith relied on Liteky, supra., in denying disqualification, this case is very clearly distinguishable from Liteky.

In Liteky, petitioners' disqualification motion was based on adverse rulings and remarks the judge had made in a case decided eight years earlier which, petitioners claimed, manifested the judge's "impatience," "disregard for the defense" and generalized "animosity" towards one of the petitioners. 510 U.S. at 541-44. Petitioners complained, for example, that the judge questioned witnesses, limited defense counsel's cross-examination, periodically cautioned defense counsel to confine his questions to material issues, and admonished one of the petitioners that closing argument was not a time for "making a speech."[22]

The complained of remarks were all of the garden-variety kind which judges frequently make while presiding over trials. No claim was (or rationally could have been) made that, during the earlier case, the judge had formed a predisposition as to the outcome of the specific facts that were to be decided in Liteky. Here, in contrast, Judge Smith made comments which demonstrate beyond peradventure that he was not merely "impatient" with the Branch Davidians, but convinced that they intentionally started a gun battle with federal agents and set a fire which resulted in at least 74 deaths. Further according to the judge, these deaths--the culmination of "an American tragedy of epic proportions"--were a result of "suicide and murder inflicted by Davidian on Davidian."[23]

Thus, unlike the judge in Liteky, the judge in this case has made several unambiguous statements from which a reasonable observer could reasonably

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[22] In most of the reported cases dealing with disqualification motions of this type, the motions also were based upon a judge's expression of irritation or frustration with the moving attorney's litigation tactics or in-court conduct; or his questioning of whether the attorney was providing his client with adequate representation. They were not cases like this, in which the motion for disqualification was based upon comments a judge made in an *extrajudicial* forum, in which he speculated about an attorney's *extrajudicial* conduct.

[23] Joint Petition Appendix D at pp. 25a-26a.

infer that he has prejudged their outcome. Certainly, the fact that the judge has made comments of this nature would be likely to leave the public with the impression that this case might be decided because of the judge's prejudgment, rather than through a proper application of impartially determined facts.[24]

C. The Significance of Judge Smith's Role as Fact Finder

Judge Smith will be sitting as the trier of fact on F.T.C.A. claims, and this is a happenstance petitioners have no right to waive. Concerns about judicial bias, or the appearance of such, are particularly acute in situations like this, where the judge is required to fulfill fact-finding functions. See, e.g., Hadler v. Union Bank and Trust Co. of Greensburg, 765 F. Supp.. 976, 979 (S.D.Ind. 1991) (the requirements of § 455(a) become incrementally more stringent when the judge becomes the fact-finder").[25]

D. Fair Judgment is Impossible

In his order denying disqualification the judge candidly conceded that, in forming his opinions of the Branch Davidians and key facts of this case, he relied in part on a series of articles that appeared in his hometown newspaper--the *Waco Tribune-Herald*. He assumed, apparently, that because these were introduced as trial exhibits they did not constitute an "extrajudicial source" for his opinions and remarks.[26] It is far from clear, however, that the mere fortuity that media reports, which the judge undoubtedly initially read and formed opinions about on his own, were ultimately introduced into the Risenhoover

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[24] In this light, Judge Smith's subjective view that he will be able to put aside his prior views and impartially weigh and evaluate new evidence which shows that his prior factual opinions were wrong is not entitled to any weight.

[25] Similarly, some courts, in denying disqualification, have taken pains to emphasize that a jury will be acting as the finder of fact, thus reducing the possibility that the public will perceive that a partial judge will be called upon to make important credibility determinations. See, e.g., Piechowicz v. United States, 885 F.2d 1207, 1211 (4th Cir. 1989).

[26] Joint Petition Appendix C at pp. 17a-18a. The judge did not discuss at all the other extrajudicial source of information petitioners alleged in their motion--his ex parte contacts with members of the A.U.S.A.'s office--nor did he analyze the significance of his having made extrajudicial remarks regarding those contacts while dining with his brother. Joint Petition Appendix C, Exhibit 1.

record automatically converted them from an 'extrajudicial' to an 'intrajudicial' source.

Assuming *arguendo* that the newspaper articles did constitute an intrajudicial source for the judge's comments and opinions, disqualification would nevertheless be warranted. That is so because this Court made it clear in Liteky that even opinions and remarks which have a wholly judicial source will support a bias challenge "if they reveal such high degree of favoritism or antagonism as to make fair judgment impossible" [Liteky, 510 U.S. at 555]. In fact, the factually similar Berger case was cited as an example of just such a situation.

In Liteky this Court did not expressly say from whose standpoint the question of whether the complained of comments reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible" is to be determined. In keeping with the express intent of the statute, however, the amicus curiae assumes that the Court would hold that disqualification is warranted under § 455(a) whenever a reasonable person would believe that such is the case. From the affidavits submitted by Ms. Haldeman and Mr. Doyle, it may be inferred that both of them strongly believe that the judge's comments revealed such a "high degree of favoritism." Petitioners also appended as an exhibit, at the trial court and Fifth Circuit, a letter sent to Judge Smith on July 8, 1997 by one of petitioners' counsel, Ramsey Clark. In that letter the former U.S. Attorney General stated, among other things, that because the judge held "adverse opinions on the controlling issues of fact" a reasonable person could not expect him to conduct a fair trial.[27]

But perhaps the best evidence of whether a reasonable person would believe that the judge's comments reveal such a high degree of animosity as to make fair judgment impossible is the affidavit provided by the U.S. v. Branch jury forewoman, Sarah Bain.[28] Ms. Bain testified that Judge Smith was

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[27] Appendix D to the Amicus Curiae Brief. This letter was part of the trial court and Fifth Circuit record.

[28] In his instructions to the jury, Judge Smith said: "[t]his Court recognizes that each of you is a reasonable person, capable of making appropriate decisions based simply on your collective common sense and experiences." Appendix E to Amicus Curiae Brief at p. 12a. This was part of the trial court and Fifth Circuit record in petitioners' case. If Ms. Bain was reasonable enough to act as foreperson of the jury which had

not only "antagonistic" to the Branch defendants, but had "come to scorn" them. She further accused Judge Smith of "deep prejudice" against the religious sect, and set forth under oath her considered belief that:

> any reasonable person reviewing all the facts fairly would have grave doubts, as I do, about the ability of Judge Smith to preside impartially over a trial in which the rights of the Mt. Carmel Church and its members are being asserted against the U.S. government....[29]

In opposing the motion to disqualify the government adduced no evidence to rebut petitioners' claims that a reasonable person would question Judge Smith's impartiality.

III. REASSIGNMENT ON REMAND

If the standard a trial court is to employ in deciding a disqualification motion has not always been as clear as a mountain lake in springtime,[30] the standard by which appellate courts are supposed to determine whether reassignment on remand would be "just under the circumstances" approaches the Kafkaesque. Consider, by way of example, U.S. v. Tucker, 78 F.3d 1313, 1325 (8th Cir. 1996). Special Prosecutor Kenneth Starr requested, on appeal, that the case be assigned upon remand to a different judge. In opposing reassignment appellees argued, inter alia, that the OIC had no standing to make

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been charged with the task of deciding whether the Branch defendants were innocent or guilty of murder, it would seem fair to assume that she was capable of forming a reasonable opinion as to whether Judge Smith, in presiding over that case, had manifested biased towards them.

[29] Joint Petition Appendix K at pp. 65a-66a. Ms. Bain was, of course, not a party to the Branch proceedings. If her percipient witness impression of Judge Smith's conduct towards the Branch Davidians is insufficient to establish that he possessed the requisite degree of antagonism, it is difficult to imagine how any petitioner could satisfy the Berger test.

[30] See, e.g., Roberts v. Ace Hardware, Inc., 515 F. Supp. 29, 30 (N.D.Ohio 1981)(noting that it "is not so easy as the Congress and the Court of Appeal seem to think it is to determine what a 'reasonable person knowing all the relevant facts' would think about anything, much less about the impartiality of a judge").

such a request. An Eighth Circuit panel professed "every confidence" that the challenged judge would "handle the case in a fair and impartial manner;" nevertheless, it "conclude[d] that this request must be granted to preserve the appearance of impartiality." A couple of months later the Eighth Circuit denied appellees' Petition for Rehearing *En Banc*. 82 F.3d 1423, 1424 (8th Cir. 1996). However, two dissenting judges complained that the standard by which the Eighth Circuit panel had remanded the case for reassignment "lack[ed] any precedential or statutory foundation and establishes an unworkable guideline defining what constitutes the appearance of partiality."[31]

Because of lingering confusion over the appropriate standard for determining a request for reassignment, it is probably safe to assume that no two circuits treat such requests exactly alike. Indeed, while some circuit courts, including the Ninth, have ordered reassignment on multiple occasions, others have remanded cases to new judges only in "extreme" or "unusual" circumstances. Still other courts, while suggesting that reassignment would be appropriate under the circumstances, have nevertheless declined to order this relief;[32] or have remanded to the lower court for its own consideration of whether reassignment was warranted. See, e.g., O'Rourke v. City of Norman, 875 F.2d 1465, 1475 (10th Cir. 1989).

There has not only been a split among the circuits, but between different panels of the *same* circuit.[33] The Fifth Circuit's own experience in dealing

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[31] Ironically, the dissenters most vehement complaints concerned the "[r]eliability of the evidence" -- primarily newspaper articles -- upon which the reassignment request was based. They noted that, in the context of § 455, the Eighth Circuit had "been extremely skeptical of press reports as a basis for a finding of partiality" and had recognized "the great potential for the media to generate inaccurate or misleading information." They further pointed out that "[t]he practice of relying on newspaper and magazine articles as proof of substantive fact has no support in the rules of evidence." 82 F.3d 1423 at 1428.

[32] See, e.g., Thompson v. Buford Tp., 445 N.W.2d 303, 306-307 (N.D. 1989).

[33] Compare, e.g., U.S. v. Roberts , 88 F.3d 872 (10th Cir. 1996) (reaffirming court's "extreme reluctance to exercise our inherent authority to reassign a district court judge on remand") with Nicholas v. Alley, 71. F.3d 745 (10th Cir. 1995) (ordering reassignment); Women's Care Services, P.A. v. Operation Rescue, Nat'l, 24 F. 3d 107, 110 (10th Cir. 1996)(same); and Mitchell v. Maynard, 80 F.3d 1433 (10th Cir. 1996) (reassigning case despite concluding that the judge harbored no personal bias).

with reassignment requests provides a case in point. In In re Corrugated Container Antitrust Litigation, 752 F.2d 137 (5th Cir. 1985), cert. denied, 473 U.S. 911 (5th Cir. 1985), a Fifth Circuit panel held that while appellate courts do have authority to remand cases to other judges in order to avoid even the appearance of bias, "such mandatory reassignments should be made infrequently and with the greatest reluctance." In more recent cases, however, other panels of the same court have expressed little reluctance to order reassignment in circumstances where such a course of action appeared just. [34]

This dichotomy may be attributed to a confusion as to the proper standard for deciding the merits of a reassignment request. In ordering reassignment in Simon v. Clute, 825 F.2d 940 (5th Cir. 1987), the Fifth Circuit appeared to adopt the three-part test that was first announced in U.S. v. Robin, 553 F.2d 8, 10 (2d Cir. 1977).[35] However, when the appropriate reassignment test was considered again by that court in Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997), the panel, apparently unaware that the Fifth Circuit had adopted the Robin standard in Clute, observed that whereas some circuits had adopted Robin's three-part test, others had invoked their statutory powers to reassign whenever the facts "might reasonably cause an objective observer to question [the judge's impartiality.]" and the court did not decide which applied

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[34] In United States v. Jordan, 49 F.3d 152, 160 (5th Cir. 1995), the appeals court directed the Chief Judge of the Fifth Circuit to assign the case to another judge outside of the trial judge's district for resentencing, saying:

> ... we want to avoid placing one of her colleagues in the uncomfortable position of effectively passing on her rulings in the sentence hearing. Moreover, having one of her own colleagues in her district pass on her past actions well might, in and of itself, exacerbate the appearance of impropriety. Id. at 160, n.18.

See also United States v. Anderson, 70 F.3d 353 (5th Cir. 1995) (court found no violation of the Sixth Amendment or the Due Process Clause, yet ordered that the sentence imposed by the district court be vacated and that the Chief Judge for the Northern District of Texas assign the case to a different judge for resentencing).

[35] Curiously, neither court made mention of the In re Corrugated Container Antitrust Litigation panel's concern that reassignment should be ordered only "reluctantly."

in the Fifth Circuit.[36] 120 F.3d 1307 (5th Cir. 1997), citing inter alia, United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C.Cir. 1995), quoting Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988). The Johnson court neither cited Clute nor said what was the appropriate Fifth Circuit standard for reassignment.

Shortly before the Johnson panel issued its order granting reassignment, the panel in this case below implicitly denied petitioners' reassignment request in a two-line order. It did not say whether it had determined petitioners' request was insufficient to warrant the requested relief under the In re Corrugated Container Antitrust Litigation standard, the Clute standard, the Jordan/Anderson standard, or some other standard; or whether it had simply failed to entertain the request at all. Likewise, in its August 5, 1997 order denying petitioners' Request for Rehearing *En Banc*, the Fifth Circuit gave no hint as to the standard it employed in determining petitioners had not established a right to reassignment.

Meanwhile, in between the time the Fifth Circuit denied petitioners' petition in these cases and the time it denied *en banc* review, yet *another* Fifth Circuit panel weighed in on the propriety of reassignment in In re John H. McBryde, 117 F.3d 208 (5th Cir. 1997). In that case the court granted a petition for a writ of mandamus, the intended effect of which was to return to the district judge two cases which the Chief Judge of the District Court had reassigned away from him.[37]

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[36] The argument that reassignment is appropriate whenever the facts "might reasonably cause an objective observer to question the judge's impartiality" would appear to do no more than restate the enumerated grounds for seeking disqualification under § 455(a). Since the basis for appellate reassignment is not judicial bias--apparent or actual--but rather the belief that the healthy administration of the judicial process would best be served by reassignment [Offutt v. United States, 348 U.S. 11, 16-18 (1954)], this "test" appears too narrow. Likewise, insofar as Robin and its progeny purport to require the party seeking reassignment to show more than that would be "just in the circumstances," the standard set forth in those cases seems too rigid.

[37] However, the Fifth Circuit's Judicial Council, having concluded that the Chief Judge's action in reassigning the cases was correct, filed a motion with the Circuit on July 22, 1997 requesting a stay of the order returning the cases to Judge McBryde until the propriety of the order of reassignment could be considered by this Court. Texas Lawyer Magazine (August 4, 1997 at p.3).

The Fifth Circuit experience demonstrates that the circuit courts are in dire need of guidance on this important issue.[38] However, this Court's own view as the propriety of reassignment is not entirely clear. In fact, in Liteky, this Court expressly left open the question of whether appellate courts have the supervisory power to grant reassignment for reasons which would not be sufficient to compel the grant of a disqualification motion. 510 U.S. at 554-55. Because this is so, and because questions about the propriety of ordering reassignment are not only certain to recur, but actually recurring on a regular basis, this Court should take this opportunity to set forth the appropriate standard for determining whether applications for reassignment should be granted.

IV. ADDITIONAL POLICY CONCERNS

In deciding whether disqualification (or reassignment on remand) is appropriate in a particular case, it is important for the court to weigh all of the countervailing policy concerns. In these cases, these would appear to augur in favor of disqualification or reassignment.

First, as this Court eloquently stated in Offutt v. United States, 348 U.S. 11, 14 (1954), it is vital that "justice must satisfy the appearance of justice." Such is never more the case than in a high profile case like this, in which the government is itself on trial; and the petitioners (as well as a sizable contingent of the public at large) have expressed serious doubts about the impartiality of the justice system. See U.S. v. Tucker, supra, ("[g]iven the high profile of the Independent Counsel's work and of this case in particular...assignment to a different judge on remand is required to insure the perception of impartiality.")

Another policy concern is that courts should not unduly infringe upon the clear intent of Congress to foster the public's confidence in the judicial process. As this Court noted in Liljeberg v. Health Services Acquisitions Corp., 486 U.S. 847, 858 n.7 (1988), Congress amended § 455 in 1974 to "clarify and broaden the grounds for judicial disqualification." The purpose of those amendments was "to promote public confidence in the integrity of the

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[38] At a minimum the circuit courts should be advised of whether they (unlike the panel below) must set forth their reasons for denying a petitioner's reassignment request, so that this Court can determine on review whether the appropriate reassignment standard was employed.

judicial process." Id. at 860.[39] The public's confidence in the integrity of the judicial process would be shaken, and certainly in no way advanced, by insisting that a judge who has previously decided the dispositive facts of these cases adjudicate those same facts again here.

Another policy concern is one of administrative convenience. It could be argued that there would be some slight judicial economy in having a judge who is already familiar with the basic facts of these cases preside over it. However, in deciding that the challenged judge should have recused himself in Berger this Court made it clear that, by so doing:

> ...there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside.... 255 U.S. at 233.

The same is true here. Neither the government nor Judge Smith has so much as suggested that it would be difficult to locate another suitable judge to handle these cases, and there appears to be no compelling policy reason for Judge Smith to insist upon handling them himself. See Nicholas v. Alley, 71. F.3d 745 (10th Cir. 1995)("We have also balanced the possible question of impartiality by a reasonable person against the relative ease of replacing Judge Alley with an available judge from a very large pool of judges outside the State of Oklahoma.")

Yet another factor courts sometimes consider in deciding disqualification applications is whether it appears the motion was interposed as a means of obtaining delay or for the purpose of "forum shopping." In these cases, these factors clearly did not come into play. Since petitioners are plaintiffs, delay is not in their interest. In any event, the motion was filed almost immediately

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[39] With the enactment of the 1974 amendments to § 455, the "duty to sit" rule which formerly prevailed in the federal courts was replaced by a presumption of disqualification. See, e.g., In re A.H. Robins Co., Inc., 602 F. Supp. 243, 245 (D.Kan. 1985). Thus, since 1974 it has generally been agreed that, in situations where there is a "close call," any doubts about disqualification are to be resolved in favor of disqualification. See, e.g., United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989). When it comes to whether a reasonable observer would harbor doubts about Judge Smith's ability to remain impartial as the trier of fact, this is certainly a case in which there is at least a "close call."

after Judge Smith was assigned to these cases. Likewise, the motion cannot seriously be characterized as an attempt by petitioners to "forum shop." Petitioners have repeatedly averred that they would be willing to have the case presided over by *any* other randomly assigned judge in the Southern or Western Districts.

The only policy concern identified by Judge Smith in denying disqualification was that "[a] judge must also be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of an anticipated adverse decision." He speculated that the motion may have been "an attempt to avoid a ruling on Defendants' motions to dismiss and for summary judgment because motions raising similar issues were for the most part decided counter to plaintiffs' interests" by Judge Smith in Gyarfas v. United States, et al., Civil Action No. W-95-CA-022.

It is true that a judge who has been called upon to decide a disqualification motion may consider whether those who question his impartiality are merely seeking to avoid the adverse consequences of having a judge who does not favor their position remain on the case. However, the suspect view of a disqualification motion must be balanced against the paramount importance of avoiding the appearance of bias or impropriety. See, e.g., Potashnick v. Port City Const. Co., 609 F.2d 1101, 1114 (5th Cir.)(any question of a judge's impartiality threatens the purity of the judicial process and its institutions"), cert. denied, 449 U.S. 820 (1980).

CONCLUSION

The Petition for Writ of Certiorari should be granted and the Order of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

Richard E. Flamm
600 Grand Avenue, Suite #410
Oakland, CA 94610
Telephone: 510-444-3075
Facsimile: 510-836-8927

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL ACTION NO.
	*	W-93-CR-046(2) (3)
VS.	*	(4) (5) (6) (7) (8) (9)
	*	(10) (11) (12)
BRAD EUGENE BRANCH,	*	
KEVIN A. WHITECLIFF,	*	
JAIME CASTILLO,	*	
LIVINGSTON FAGAN,	*	
PAUL GORDON FATTA,	*	
GRAEME LEONARD CRADDOCK	*	June 16-17, 1994
RENOS AVRAAM and	*	
RUTH OTTMAN RIDDLE	*	San Antonio, Texas

* * * * * * * * * * * * * *

BEFORE THE HONORABLE WALTER S. SMITH, JR.,
JUDGE PRESIDING

SENTENCING

* * * * * *

MR. TINKER: . . . I do know that Your — as Your Honor mentioned, that members of the public have written in an effort to hopefully assist Your Honor and — and demonstrate what the public feeling is. Whether or not Your Honor feels that was a concerted effort by people who represent the — the accused and the Defendants in this case, I don't know. But, in any event, we know what the jury would do. . . .

* * * * * *

THE COURT: It's a concerted effort by people who are so anti-government that they would take that position anywhere, any time.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEBBORAH BROWN, et al,	*	
	*	
Plaintiffs,	*	
	*	DOCKET NO. W-96-CA-142
-VERSUS-	*	
	*	JUDGE WALTER S. SMITH, JR.
UNITED STATES OF AMERICA, et al.,	*	
	*	
	*	
Defendants.	*	
	*	

STATE OF TEXAS }
} ss
COUNTY OF }

AFFIDAVIT OF CLIVE DOYLE

Before me, the undersigned authority, personally appeared Clive Doyle, who, being by me duly sworn, deposed as follows:

1. My name is Clive Doyle. I was a defendant in United States v. Brad Eugene Branch, et al., W-93-CR-146. I was found not guilty of all charges against me.

2. I have been a member of the Seventh Day Adventist Church since 1951 and of the Mt. Carmel Church since 1957. I am a plaintiff in this civil suit, suing for the death of my youngest daughter, Shari, age 18, whom I was unable to save during the fire on April 19, 1993.

3. I have been asked by my lawyers to give this affidavit in support of a motion by plaintiffs asking that Judge Walter S. Smith, Jr., be disqualified from presiding over the case.

4. I thought Judge Smith was prejudiced against the defendants, our Church and religion from the time he selected the jury through the time he sentenced those defendants who were convicted of some minor charges. He did all the questioning of prospective jurors and asked questions like whether they belonged to main stream churches which reinforced the prejudice caused by his characterization of our religion as a cult and our Church as a compound. At trial he seemed to rule for the government on all important issues and he effectively prevented us from presenting evidence of self defense which made his final instructions on self defense on the murder counts not worth much. I never detected any concern on his part for the deaths of our children, families, Church and property but he was compassionate about the deaths of the four ATF agents. He didn't seem to be concerned about the way the government attacked our Church, knowing it was full of people, mostly women and children.

5. At the sentencing Judge Smith's prejudice seemed to run away with him. He went far beyond any evidence I heard and said things I know are not true when he said our religious beliefs taught that we "must bring about a violent conflict with federal agents." Our religious belief never caused us to want to bring about a violent conflict with federal agents, or anyone else. David Koresh never preached we should go looking for a fight with anyone. The ATF came after us. We had lived peacefully as a Church group in Waco for years without any trouble. We didn't go after them. All the evidence shows that. We didn't start the fire in the Church and our members didn't kill each other or commit suicide. Our religion is against suicide and we never discussed it. The fact that Judge Smith made all those statements as fact shows how prejudiced he is against us, just like his sentencing five church members acquitted of murder to 40 years as if they had been convicted.

6. Since our trial, Judge Smith has written and said things that reveal some great prejudice and hatred toward our Church and religion. He has said the press should have known how dangerous we were before February 28, 1993. We weren't and nobody thought we were, as far as I know. I consider we were on good terms with both the Sheriff's Office and the Police Department and there was no reason for them to consider us dangerous.

7. Judge Smith never attended our Church, met its members, heard our Bible discussions, sermons, or participated in our religious studies, yet he says our religious teachings did not focus on the Golden Rule, but on paramilitary training. The Golden Rule was read and discussed in the Church,

probably everyday by someone, and probably more than any church Judge Smith ever attended. We believe in the Golden Rule and try to practice it.

8. Paramilitary training was never a part of our religious teaching. Our religious teaching comes from the Bible. A few of the men bought and sold guns and helped support the Church with the proceeds. Guns were also kept to protect the Church and its members. We live on earth, in Texas, and guns are part of the culture. The Bible teaches that there will be violent conflict on earth in the last days and that forces of evil will combat forces of good, but we never sought, or wanted violence, or combat and were not some kind of National Guard, or organized militia. We were religious people, studying, praying and living together in the exercise of our religion. We came from all over the world for that purpose. We loved our lives at Mt. Carmel. If we hadn't, we could have and would have left, just as others had done in the past.

9. For Judge Smith to see the Church as a fortress, or a fort style building, is a reflection of his prejudice. No fortification expert would consider it a fort. It was a religious community center built pretty much with our own hands to serve our religious and living needs. For Judge Smith to write that David Koresh had "exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples" reveals his ignorance and prejudice. Why the subject is proper for a legal opinion is not clear, but if the Judge wants to write about our religion he ought to study it and hear what those in the Church say so he could know what he is writing about. I don't know where he gets his facts, but he has become a major part of the effort of the government to demonize our religion and Church.

10. For Judge Smith to decide David Koresh is a "false prophet" in a case in which the Church cannot even defend itself is to set the courts above religion to decide what is true religion and what is false. We believe David Koresh was a true prophet.

11. I do not believe it is possible for us plaintiffs who are members, or relatives of members of the Mt. Carmel Church and believe in its religious teachings, and who seek justice and truth for the memories of our children, relatives and friends who died there, can possibly get a fair trial

before Judge Smith. I believe it is important to freedom of religion and the integrity of the governments of the United States and of Texas that we get a fair trial and that the world believe it is intended to be fair.

/s/ Clive Doyle

SWORN TO AND SUBSCRIBED before me
on the 28th day of May, 1996.
My commission expires: 4-25-2000
NOTARY PUBLIC, State of Texas
(Sharon Swartz)

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

DEBBORAH BROWN, et al,	*	
	*	
Plaintiffs,	*	
	*	DOCKET NO. W-96-CA-142
-VERSUS-	*	
	*	JUDGE WALTER S. SMITH, JR.
UNITED STATES OF AMERICA, et al.,	*	
	*	
Defendants.	*	

STATE OF TEXAS }
} ss
COUNTY OF }

AFFIDAVIT OF BONNIE CLARK HALDEMAN

Before me, the undersigned authority, personally appeared Bonnie Clark Haldeman, who, being by me duly sworn, deposed as follows:

1. My name is Bonnie Clark Haldeman. I am the mother of David Koresh, the mother-in-law of Rachel Jones Koresh and the grandmother of Cyrus Ben Joseph Howell, deceased; Star Hadassah Howell, deceased; Serenity Sea Jones Koresh, deceased; Dayland Lord Gent, deceased; Paiges Gent, deceased; Bobbie Lane Koresh, deceased; Chica Jones Koresh, deceased; Little One Jones Koresh, deceased; Startle Summers, deceased, Chanel Andrade, deceased; and Mayana Schneider, deceased. I am a plaintiff in this case and bring suit for the deaths of my son and my grandchildren as well as for myself. I have been a member of the Mt. Carmel Church for many years and was raised as a Seventh Day Adventist.

2. I have been asked by my lawyers to give this affidavit in support of a motion by plaintiffs asking that Judge Walter S. Smith, Jr., be disqualified from presiding over the case.

3. The only reason for the existence of our Church was for religious purposes. Mt. Carmel was a place of Bible study and worship. A great part of each day was spend in Bible readings and discussions. It was for the purpose of studying the Bible that members came from many countries. In order to facilitate this study many made Mt. Carmel their temporary home.

4. We never considered ourselves a "cult." We understood this was a very negative term. We believed in the right of everyone to choose the religion they believed in. Our faith was a subject of constant discussion and analysis. Our members were free to choose and exercise their religious faith. This created vital religious discussion and deep faith.

5. We never heard the Church center called a compound until this tragedy. It was a religious center for worship, living, work, education and recreation. It is outrageous and ridiculous, and certainly contemptuous, to call the center a fortress. It was church and home. To say the "fort style" of the Church was a reflection of David's apocalyptic mentality is not at all true. Many people contributed to the way the Church building grew, like Topsy perhaps, but serviceable for religious services and studies with its large chapel and adjacent areas for study and prayer; for living with large kitchen and dining room areas and small private family quarters with a gym, pool and outdoor areas and equipment for recreation. It was made of cheap wood, homemade construction and not fancy, but we loved it.

6. David was a serious Bible scholar from childhood. He read and discussed the Bible and religion constantly. It was real and important to him. He could quote more, and more accurately, from the Bible than anyone I ever knew. After all he was surrounded by people who read the Bible every day often for hours. Of course David was thoroughly familiar with the Golden Rule and often discussed it. He believed in it. Judge Smith doesn't know anything about David's religion and has no basis to condemn it or to call it paramilitary, or to call David a false prophet. Our Church believes in prophecy and prophets. We search the Bible for the truth. We love our children, try to teach them to be good people and Judge Smith has no right to judge David or our religion. We will let the Lord tell us who the true prophets are.

7. David changed his name from Vernon Wayne Howell to David Koresh, under God's guidance, partly because of Bible prophecy having to do with the last days, and partly to help forward his religious music. The name David Koresh had symbolic meaning for this time. He changed his name legally down at the Courthouse. Judge Smith has no right to place a slur on his

choice of name, and shows prejudice by so doing. I accepted David's new name and believe that all the other Church members did as well.

8. Judge Smith's claim that David had exclusive access to all female followers above the age of twelve, including the wives and daughters of his male disciples shows a lack of understanding of our religious beliefs. His statement is a malicious insult to all Church members and our religion, designed to make us appear licentious and duped. No decent person would spread these prejudicial statements around without seeking to study and understand the truth for our Biblical point of view.

9. I have followed Judge Smith's words and acts since the tragedy at Mt. Carmel and believe he is deeply hateful of our religion, our Church and even our dead. I do not believe our Church, religion, our Members who died in this tragic assault by government, including my son and grandchildren can possibly get a fair trial before Judge Smith, or that any reasonable and knowledgeable person would believe we could.

/s/ Bonnie Clark Haldeman

SWORN TO AND SUBSCRIBED before me
on the 23 day of May, 1996.
My commission expires: 6-4-96
NOTARY PUBLIC, State of Texas
(Marilyn Lust)

APPENDIX D

RAMSEY CLARK
LAWRENCE W. SCHILLING

LAW OFFICES
36 East 12th Street
New York, N.Y. 10003
(212) 475-3232
FAX (212) 979-1583

April 23, 1996

Hon. Walter S. Smith, Jr.
United States District Judge
United States Courthouse
800 Franklin Avenue
Waco, TX 76701

Federal Express

Dear Judge Smith,

I write on behalf of all the plaintiffs in the several civil actions involving claims for wrongful death and injury at the Mt. Carmel Church in 1993 which have been transferred to your court from Houston.

Plaintiffs and their counsel believe that justice, the appearance of justice and public confidence in the impartiality of the judiciary require trial at a place and before a judge free of the inherent and inescapable prejudices that permeate the Waco community concerning this tragic history and its aftermath.

Most plaintiffs sued in Houston for these reasons. Judge Atlas has decided venue is not proper there but declined to rule on transfer within the Western District and assignment of a new judge.

In meetings last Thursday and Friday with plaintiffs in Waco to attend the third anniversary services for those who died there, their views and instructions to counsel were unanimous and firm that transfer of the proceedings to San Antonio or Austin, and trial before a new judge are essential to their quest for justice.

Counsel concur and are preparing motions for such relief. We hope to be able to file them by May 6. We respectfully request that you rule on these motions before taking any other action in these cases.

This time is required to review the records for this purpose in the Branch criminal trial, the Reisenhoover case, other cases and research the extensive media coverage concerning these matters.

Our concerns arise in part from statements by you expressing your personal opinions that the Church members started the April 19th fire, that they ambushed the ATF and fired first on February 28, that adult Church members engaged in a conspiracy to cause the deaths of federal agents, that all but a handful of the Church members were killed by suicide and murder inflicted by "Davidian upon Davidian," that the media knew how dangerous sect leader David Koresh and his followers were even before February 28 and from your many characterizations of unrelated alleged criminal acts by Church members such as credit card fraud and sexual abuse of minors and your frequent negative comments about their Church doctrine such as it being focused on paramilitary training, and not focused on the "Golden Rule" and that David Koresh was a "false prophet."

Many of these statements reveal that you hold adverse opinions on controlling issues of fact in our cases, facts which were previously either not controlling or not at issue, and at the very least these statements will create an impression among reasonable persons that the plaintiffs might not get a fair trial in the civil actions which will involve trial by jury of claims against individual defendants and a bench trial of claims against the United States under the Federal Tort Claims Act.

We mention these few illustrations of our concern to urge you to consider whether you should recuse yourself under the provisions of 28 U.S.C. § 455(a) because your impartiality might reasonably be questioned. We make this point with an appreciation of the fairness with which you acted in the Branch criminal case in taking judicial notice of bias in the Waco community against the Mt. Carmel Church and transferring the case to San Antonio because of that.

If after consideration, you decide to recuse yourself and transfer the proceedings to San Antonio or Austin in the interest of justice, we believe you would render a great service to history and the judiciary. It is too much to expect the public or posterity to ever believe that the interests of justice can be served or the appearance of impartiality preserved by a trial in Waco or in which you preside.

Please have your clerk advise us if May 6 is not a reasonable time for filing these motions and if you decide to take action under § 455 on your own motion.

Sincerely,

/s/ Ramsey Clark

cc: Marie L. Hagen, Esq.
Joseph Sher, Esq.
Reed Lockhoof, Esq.
Dickie Grigg, Esq.
Martha Dickie, Esq.
All plaintiffs' counsel
(BY FAX)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No. W-93-CR-046
	§	
BRAD EUGENE BRANCH (2),	§	
KEVIN A. WHITECLIFF (3),	§	
CLIVE DOYLE (4),	§	
JAIME CASTILLO (5),	§	
LIVINGSTON FAGAN (6),	§	
PAUL GORDON FATTA (7),	§	
WOODROW KENDRICK, also	§	
known as BOB KENDRICK (8),	§	
NORMAN WASHINGTON	§	
ALLISON, also known as DELROY	§	
NASH (9), GRAEME LEONARD	§	
CRADDOCK (10), RENOS	§	
AVRAAM (11), and RUTH	§	
OTTMAN RIDDLE (12)	§	

COURT'S INSTRUCTIONS TO THE JURY

* * * * * *

This Court recognizes that each of you is a reasonable person, capable of making appropriate decisions based simply on your collective common sense and experiences. However, our society is, and must be, ruled by law and not by men. Thus it would violate the very linchpin of our judicial system if you were to render a decision not based on the law as I am now explaining it.

* * * * * *